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No. 879

In the

Supreme Court of the United States

OCTOBER TERM, 1966

THE PENNSYLVANIA RAILROAD COMPANY and THE PHILADELPHIA, BALTIMORE & WASHINGTON RAILROAD COMPANY,

Petitioners,

vs.

AMERICAN NATIONAL BANK AND TRUST COMPANY, Guardian of the Estate of HENRY LEE EDWARDS, a minor,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Petitioners pray that a writ of certiorari be issued to review the judgment of the Supreme Court of Illinois entered in the above-entitled cause on June 16, 1966.

Citations to Opinions Below

The Supreme Court of Illinois filed three separate opinions. The first opinion (R. 25-31) is unreported and is printed in Appendix A attached hereto at page 1a. The second opinion (R. 40-45) is unreported and is printed in Appendix A at page 8a. The third opinion (R. 59-65), printed in Appendix A at page 14a, is reported at 35 Ill. 2d 145; 219 N. E. 2d 529 (1966).

The opinion of the Appellate Court of Illinois (R. 2, pp. 1a-29a), printed in Appendix A at page 21a, is reported at 52 Ill. App. 2d 406, 202 N. E. 2d 79 (1964).

Jurisdiction

The final opinion of the Supreme Court of Illinois was filed on June 16, 1966. R. 59; p. 14a, *infra*. A timely petition for rehearing, filed on July 1, 1966 (R. 67; Appendix B, *infra*, p. 52a), was denied on September 21, 1966 (R. 80). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) since a right is claimed under the Constitution of the United States.

The federal question was raised for the first time in the petition for rehearing filed by petitioners following the first opinion of the Supreme Court of Illinois. The first opinion of the Supreme Court of Illinois (Appendix A, p. 1a) holding void the ordinances upon which petitioners' liability had been based but nevertheless affirming the judgment against them was entirely unexpected. The federal question was raised in the following language:

> "A trial based on void and invalid ordinances, which the jury was instructed were valid and binding, cannot constitute a trial before a fair and impartial jury to which defendants are entitled. Ill. Const. Art. 2 §5; U.S. Const. amend. VII, XIV" (R. 33; Appendix B, p. 46a.)

The federal question was restated and reasserted in each of the briefs and papers thereafter filed in connection with the second and third opinions of the Supreme Court of Illinois (Appendix B).

Thus the federal question arose as a result of the unexpected decision of the Supreme Court of Illinois and pe-

titioners asserted it at the first opportunity, which was the filing of their petition for rehearing from that decision. *Herndon* v. *Georgia*, 295 U.S. 441, 443-444.

QUESTIONS PRESENTED

This was a personal injury action against three railroads, the Pennsylvania, the Milwaukee and the Philadelphia, Baltimore & Washington. The last named railroad is a subsidiary of the Pennsylvania and the two have been treated as a single defendant throughout the litigation. They will be referred to in this petition as the Pennsylvania. The accident occurred when the plaintiff fell beneath a Milwaukee railroad train which was operating on the tracks of the Pennsylvania under an agreement between the two companies.

The allegations of negligence against the Pennsylvania were two:

(1) that it failed to fence its railroad tracks in accordance with certain ordinances of the City of Chicago; and

(2) that it was derivatively liable for the alleged negligence of the Milwaukee in the operation of its train on the tracks of the Pennsylvania.

The sole allegation against the Milwaukee was negligence in the operation of its train.

At the conclusion of the trial the jury returned a general verdict against all defendants. Upon review, the Supreme Court of Illinois held that the Chicago fencing ordinances were void, that the trial court erred in admitting them into evidence and instructing the jury that they were valid, and that the result of this error was to deprive the Pennsylvania of a fair trial. Nevertheless, the Supreme Court of Illinois affirmed the judgment on the ground that

the Pennsylvania was derivatively liable for the negligence of the Milwaukee and that the Milwaukee had received a fair trial. The questions presented are:

1. Whether the Supreme Court of Illinois denied due process of law to the Pennsylvania in affirming the judgment against it notwithstanding the court's finding that it was deprived of a fair trial.

2. Whether the Supreme Court of Illinois deprived the Pennsylvania of its right to a trial by jury in affirming the judgment against it notwithstanding the court's finding that it was deprived of a fair trial.

STATEMENT OF THE CASE

The plaintiff, a 13 year old boy at the time of the accident, was seriously injured on the afternoon of June 12, 1959, when he fell from a moving railroad train upon which he had been hitching rides and suffered the traumatic amputation of the right leg below the knee and the left leg above the knee.

Suit was subsequently brought against the Pennsylvania Railroad Company and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, which owned and operated the train upon which the plaintiff was playing when he was injured. At the time of the accident, the Milwaukee railroad was operating on the tracks of the Pennsylvania under an agreement between the two companies.

The case was tried before a jury in the Circuit Court of Cook County. The allegations against the Pennsylvania were two;

1. that it failed to fence its railroad tracks in accordance with certain ordinances of the City of Chicago; and

2. that it was derivatively liable for the alleged negligence of the Milwaukee in the operation of its train on the tracks of the Pennsylvania.

The sole allegation against the Milwaukee was negligence in the operation of its train.

Nearly one-half of the trial was devoted to the question of the validity of the ordinances upon which plaintiff relied in order to prove that the Pennsylvania had the obligation of fencing its tracks in the area so as to keep persons off of the tracks. Over the repeated objections of the Pennsylvania, the ordinances of 1890, 1896, 1897, 1898, 1905, 1906 and 1911 were admitted into evidence (R. 4, pp. 6-100), read to the jury (R. 3, pp. 191-201, 222-231), made the subject of a motion to strike Count I of the complaint (R. 3, p. 35), and contested and controverted throughout the trial (R. 3, pp. 23-32, 35, 41-42, 44-45, 59, 75-89, 170-191, 264-269, 297-312, 361-376, 447-467; R. 7, pp. 3-8). Over the objections of the Pennsylvania, the court instructed the jury that the ordinances were valid and in full force and effect at the time of the accident (R. 3, pp. 44-45, 41-43), and that if the plaintiff proved his claim against the Milwaukee, the jury should find against all defendants (R. 3, p. 47). The jury returned a general verdict against all defendants in the amount of $275,000.00 (R. 3, p. 56).

The Milwaukee paid the plaintiff $75,000.00 in exchange for a covenant not to enforce the judgment against it. (R. 3, pp. 72-73) The Pennsylvania appealed to the Appellate Court of Illinois, First District, which affirmed the judgment, holding that the ordinances were valid and that no error was committed by the trial court (Appendix A, pp. 21a-45a).

How Federal Question Is Presented

The Pennsylvania filed a petition for leave to appeal to the Supreme Court of Illinois (R. 2), which was granted

(R. 22). The first opinion of the Supreme Court of Illinois held that the Chicago fencing ordinances were void, that the trial court erred in admitting them into evidence and instructing the jury that they were valid and that this error was prejudicial to the Pennsylvania. Nevertheless, the Supreme Court of Illinois affirmed the judgment on the ground that the Pennsylvania was derivatively liable for the negligence of the Milwaukee and that the Milwaukee had received a fair trial. (Appendix A, pp. 1a-7a). The Pennsylvania filed a petition for rehearing asserting that the opinion deprived it of a fair trial before an impartial jury in violation of both the Illinois and United States Constitutions (Appendix B, p. 46a).

The petition for rehearing was granted and the court filed a second opinion which held that the introduction of the ordinances was prejudicial to the Pennsylvania, requiring a new trial (Appendix A, pp. 8a-13a). The opinion concluded:

> "It is true, and plaintiff recognizes, that liability cannot be based on breach of the ordinances which we find to be void. The point that plaintiff chooses to ignore, however, is that the introduction of the ordinances, the strong emphasis placed on their breach and the instruction that they were valid was highly prejudicial to the Pennsylvania.
>
> "In considering whether the jury would have reached the same result if the highly prejudicial evidence had not been admitted we must deal with practicalities. We feel that fairness requires a new trial. The judgments are reversed and the cause remanded for a new trial." (Appendix A, pp. 12a-13a).

The plaintiff then filed a petition for rehearing (R. 47), which was granted (R. 48), and the court issued its third opinion which is a duplicate of the first opinion (Appen-

dix A, pp. 14a-20a). The Pennsylvania then filed its second petition for rehearing (R. 68), again asserting that the opinion denied it a fair trial in violation of the due process clause of both the Illinois and the United States Constitutions (Appendix B, p. 52a). In response to plaintiff's motion to strike its second petition for rehearing (R. 70-74), the Pennsylvania urged once again that the opinion violated its "right to a fair trial and to due process of law. Ill. Const. Art. 2, §5, §§2, 19; U.S. Const. Amend., VII, XIV." (Appendix B, p. 54a). The second petition for rehearing was denied by the Supreme Court of Illinois on September 21, 1966.

REASONS FOR GRANTING THE WRIT

1. It is fundamental that the constitutional right to due process of law is an individual right (U.S. Const. amend. XIV); that the right to a fair trial is an essential of due process of law (*Shelly* v. *Kraemer*, 334 U.S. 1, 16); that a corporation is a person entitled to such right within the meaning of the fourteenth amendment (*Smith* v. *Ames*, 169 U.S. 518, 522-523); and that the federal guaranty of due process of law includes state judicial action. *Shelly* v. *Kraemer*, 334 U.S. 1, 15.

Although it is manifest from the statement of the case, it will nevertheless be further demonstrated that the Supreme Court of Illinois deprived petitioners of a fair trial in violation of their constitutional right to due process of law. The concern of this Court, however, should be directed not only to the denial of a fair trial, but also, and perhaps more importantly, to the manner in which the denial took place. The final unanimous opinion of the Supreme Court of Illinois fails to mention the two preceeding opinions. Most significantly, however, it fails to acknowledge the court's awareness of the question of the

denial of a fair trial, which it so clearly recognized in its second opinion:

> "It is true, and plaintiff recognizes, that liability cannot be based on breach of the ordinances which we find to be void. The point that plaintiff chooses to ignore, however, is that the introduction of the ordinances, the strong emphasis placed on their breach and the instruction that they were valid was highly prejudicial to the Pennsylvania.
>
> "In considering whether the jury would have reached the same result if the highly prejudicial evidence had not been admitted we must deal with practicalities. We feel that fairness requires a new trial. The judgments are reversed and the cause remanded for a new trial." (Appendix A, pp. 8a, 12a-13a.)

It is difficult to believe that after such a statement the court could write another opinion not even referring to the question of a fair trial. It would appear that the concern of the Supreme Court of Illinois is in preserving the illusion rather than the substance of due process of law.

Since this case involves multiple defendants, and since there were two allegations of liability against the Pennsylvania, one based upon the ordinances and the other upon the Pennsylvania's derivative liability for the negligence of the Milwaukee railroad in the operation of its train,[1] the court was able to make it appear that even though the violation of the ordinances theory could not be upheld, the judgment could nevertheless be affirmed under the remaining theory. Had the Pennsylvania been the only defendant, however, the court acknowledges in effect that it would be compelled to reverse the judgment.

---

[1] It is worthy of note that nowhere in the opinion does the court specify just what the negligence of the Milwaukee was.

In its final opinion, after holding that the ordinances were void and that it was error to admit them into evidence, the court states:

> "Whether all this emphasis that was placed on the invalid ordinances requires us to grant a new trial depends on the effect such emphasis may have had on the other bases of liability advanced against the Pennsylvania. A second bases of liability advanced against the Pennsylvania was that it was vicariously liable for the negligence of the Milwaukee." (Appendix A, p. 18a.)

The court then goes on to find that the Milwaukee received a fair trial and upholds the judgment against the Pennsylvania on the basis of its derivative liability for the negligence of the Milwaukee. In this manner the Supreme Court of Illinois was able to use the multiple defendants involved in this litigation as a way in which to affirm the judgment even though in doing so it denied due process of law to the Pennsylvania.

Thus, at a time when civil litigation is growing increasingly more complex; when suits involving multiple defendant parties are commonplace, when third party complaints and cross-claims are many and counterclaims often mandatory, the guarantees of a fair trial to each individual must be reaffirmed by this Court. It should be made clear that multiple parties are each entitled to their individual right to due process of law, including the right to a fair trial, that these are individual rights and as such are not subject to collective application or synthesis in complex and intricate litigation, and that the test of whether such rights have been preserved will be based upon the substance of the right and not upon the appearance thereof.

2. As set forth more fully in the Statement of the Case, the ordinances were involved in every aspect of the trial and were read to the jury (R. 3, pp. 191-201, 222-231). Quotations from and reference to them occupy more than half of the plaintiff's amended complaint (R. 3, pp. 2-14), and they are referred to or quoted from on nearly one-half of the pages of the abstracts (R. 3, 4). In his closing argument to the jury, the attorney for the plaintiff stated:

> "I am sure counsel defending those railroads does not seriously suggest to this jury his companies or that the companies he works for complied with the fencing and track elevation ordinances. I don't believe in talking about things by indirection or trying to say one thing and implying something else. Let's talk exactly about what the situation is" (R. 3, pp. 428-429).
>
> "Can counsel say to you here, can he look you in the eye and say to you they complied with that law? They know they didn't."
>
> "Ladies and gentlemen, it could not have been proven more conclusively if you heard cases for a thousand years that the law was passed and they violated that law" (R. 3, p. 429).
>
> "All of the time I spent here with you trying to prove these ordinances, their knowledge of them and their acceptance of them, and counsel for the Pennsylvania and Philadelphia Railroads hasn't a word to say in extenuation or explanation of why their railroads didn't obey the law" (R. 3, p. 430).

Thus the attorney for the plaintiff was able to characterize the Pennsylvania as a quasi-criminal which wilfully and knowingly refused to comply with the Chicago fencing ordinances. The trial court, having admitted the ordinances into evidence, then instructed the jury that they were in

full force and effect at the time of the accident (R. 3, pp. 44-45; Appendix D, p. 57a).

This is error of the most prejudicial kind. In effect, the instruction amounted to the direction of a verdict of guilty against the Pennsylvania. This court recently reversed a judgment which had been affirmed by the Supreme Court of Ohio, and in so doing stated: "Due process requires that the accused receive a trial by an impartial jury free from outside influence." *Sheppard* v. *Maxwell*, 384 U. S. 333, 362. In the instant case we need not look for outside influences. The prejudice was immediate and direct and was supplied by the court itself, not only in its rulings on the admission of evidence, but in its instructions to the jury as to the substantive law of the State of Illinois.

It is well-established that erroneous rulings in jury trials are presumptively injurious, especially those embodied in instructions to the jury, and a judgment based upon them must be reversed unless it affirmatively appears that they were harmless. *Fillipon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 82; *Farris* v. *Interstate Circuit*, 116 F. 2d 409, 412 (C.C.A. 5, 1941). It is equally well-established, and has been recently reaffirmed, that if one theory of liability upon which a general verdict may have rested is held erroneous, the verdict must be reversed. *Sunkist Growers* v. *Winckler & Smith Co.*, 370 U.S. 19, 29-30; *Sears* v. *Southern Pacific Co.*, 313 F. 2d 498, 503 (C.C.A. 9, 1963). It has been held many times that in cases where error has been committed in the admission of evidence, even when it is not embodied in instructions to the jury, if one cannot say with certainty that the error had no effect on the jury, the judgment must be reversed even if there is other evidence which might have been sufficient, standing alone, to uphold the judgment. *Lynumn* v. *Illinois*, 372 U.S. 582, 536-537; *Kotteakos* v. *United States*, 328 U.S. 750, 764-765.

3. There remains the question of the denial of the right to a jury trial. It seems clear that a court of review cannot acknowledge prejudicial error in the trial court and yet affirm a jury verdict without usurping the jury function. The Supreme Court of Illinois has so held:

> "The right of trial by jury is recognized in the Magna Carta, our Declaration of Independence and both our State and Federal Constitutions. It is a fundamental right in our democratic judicial system. Questions which are composed of such qualities sufficient to cause reasonable men to arrive at different results should never be determined as matters of law. The debatable quality of issues such as negligence and proximate cause, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness and necessity of leaving such questions to a fact-finding body. The jury is the tribunal under our legal system to decide that type of issue. To withdraw such questions from the jury is to usurp its function. *Bailey* v. *Central Vermont Railway Co.*, 319 U.S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444." *Ney* v. *Yellow Cab Co.*, 2 Ill. 2d 74, 80 (1954).

This Court has stated:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences." *Tennant* v. *Peoria & P. U. Ry.*, 321 U.S. 29, 35, *rehearing denied* 321 U.S. 802.

Many other cases so hold. *Rogers* v. *Missouri P. R.R.*, 352 U.S. 500, 509-510, *rehearing denied* 353 U.S. 943; *Gibson* v. *Phillips Petroleum Co.*, 352 U.S. 874, *rehearing denied* 352 U.S. 937; *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 445-446; *Gallick* v. *Baltimore & Ohio R.R.*, 372 U.S. 108, 114-117.

In conclusion it should be that the instant case was brought to the attention of this Court after the Illinois Appellate Court decision was handed down (Appendix A, p. 21a, 52 Ill. App. 2d 406, 202 N. E. 2d 79 (1964)). In a similar case tried in the United States District Court in Chicago, the trial court ruled that the fencing ordinances were void and withheld them from the jury. A verdict of not guilty was returned. The verdict and the trial court's holding that the ordinances were void was affirmed on appeal. *Blaauw* v. *Grand Trunk Western R. R.*, 333 F. 2d 540 (C.C.A. 7, 1964). A petition for writ of certiorari from that opinion was filed in this Court, pointing out the inconsistent holdings of the two courts on the question of the validity of the ordinances. This Court granted the petition for writ of certiorari, vacated the judgment and remanded the case for reconsideration in light of the opinion of the Illinois Appellate Court in the instant case. *Blaauw* v. *Grand Trunk Western R. R.*, 380 U. S. 127.

In justice and fairness, this Court should do no less at this time.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CORNELIUS P. CALLAHAN
Counsel for petitioners

December 16, 1966

APPENDIX A

OPINION OF THE SUPREME COURT OF ILLINOIS
Filed Nov. 19, 1965

Docket No. 39074—Agenda 29—September, 1965.

American National Bank and Trust Company, Guardian of the Estate of Henry Lee Edwards, Appellee, v. The Pennsylvania Railroad Company *et al.*, Appellants.

MR. JUSTICE HOUSE delivered the opinion of the court:

This action was commenced in the circuit court of Cook County by American National Bank and Trust Company, guardian of the estate of Henry Lee Edwards, a minor, against the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, the Pennsylvania Railroad Company and the Philadelphia, Baltimore and Washington Railroad Company to recover damages for injuries suffered by the Edwards boy when he was run over by one of Milwaukee's trains. The jury returned a verdict against all three defendants in the amount of $275,000 and judgment was entered on the verdict. The Milwaukee paid plaintiff the sum of $75,000 for a covenant not to enforce the judgment against it and the other two defendants appealed to the Appellate Court, First Judicial District. That court affirmed the judgment, (*American National Bank and Trust Co.* v. *Pennsylvania Railroad Co.* 52 Ill. App. 2d 406,) and we granted leave to appeal.

There is no dispute as to the facts which are covered in more detail in the Appellate Court opinion. On June 12, 1959, Henry Edwards and his friend Jose Lopez boarded a tank car on a slow moving Milwaukee freight train and rode it a few blocks to the Van Buren Street underpass on their way to a playground on Van Buren Street. As they were stepping off the train, Edwards bumped into Lopez, fell and suffered traumatic amputation of his legs.

The Philadelphia, Baltimore and Washington Railroad Company is a subsidiary of the Pennsylvania and these two railroads have been treated throughout these proceedings as a single defendant. They leased to the Milwaukee the track on which the train was operating when the boy was injured.

Count I of the amended complaint charges the Pennsylvania with failure to comply with the fencing requirements of a city of Chicago special contract ordinance passed on January 18, 1897. The ordinance required the accepting railroads to elevate certain portions of their track, to construct underpasses at various intersecting streets and to either build retaining walls for the elevations or enclose them with fences in accordance with the fencing ordinance of 1890. In return, other city ordinances relating to speed, the giving of signals and the maintenance of gates, flagmen, watchmen, signals and signal towers were to be inapplicable where the tracks were elevated. It is not disputed that the ordinance was accepted by the Pennsylvania's predecessors in title, that the track where the accident occurred is elevated and that there is no retaining wall or fence enclosing the elevation.

The Pennsylvania has devoted over one-half of its brief to, and strenuously asserts, five different grounds for holding the ordinance invalid and three grounds for holding it was not applicable to it. An *amici curiae* brief has been filed by nine major railroad companies urging us to reverse that portion of the Appellate Court opinion holding that the ordinance in question is valid and binding on the Pennsylvania.

In 1913 the legislature of this State enacted a Public Utilities Act which became effective January 1, 1914, (Laws of 1913, pp. 459-502,) vesting general supervision over all public utilities, including railroads, in the Public Utilities Commission which, by act of 1921, became the Illinois Commerce Commission. (Laws of 1921, pp. 702-754.) Prior to that time and until 1925, cities and villages regularly enacted ordinances affecting railroad operations.

The Chicago speed ordinance of March 26, 1890. (which contains the fencing requirement herein in question) was, for example, re-enacted several times prior to 1922, under power granted by paragraph 26 of section I of article V of the Cities and Villages Act of 1872. (Ill. Rev. Stat. 1874, chap. 24, par. 62; see *Heiting* v. *Chicago, Rock Island and Pacific Railway Co.* 252 Ill. 466.) In 1925 this court ruled, however, that the legislature by enacting the Public Utility acts of 1913 and 1921 had withdrawn from municipalities their authority to pass new, or enforce existing, ordinances which related to public utilities. (*Village of Atwood* v. *Cincinnati, Indianapolis and Western Railroad,* 316 Ill. 425; *Northern Trust Co.* v. *Chicago Railways Co.* 318 Ill. 402.) This holding was also applied where the ordinance was of a special contract nature. (*City of Chicago* v. *Commerce Com. ex rel. Chicago and Western Indiana Railroad Co.* 356 Ill. 501; *City of Chicago* v. *Chicago and North Western Railway Co.* 4 Ill. 2d 307.) Furthermore, since 1957 the Commerce Commission has been given explicit authority to regulate right-of-way fences. Ill. Rev. Stat. 1957, chap. 111⅔, par. 61.

The Appellate Court, while recognizing the above holding by this court, nevertheless held the ordinance valid by its interpretation of the Commerce Commission's General Orders 121 and 138. In the 1925 *Northern Trust* case this court stated, "If it had been deemed wise or necessary, municipal ordinances and police regulations relating to public utilities could have been continued in force until the commission acted, by a saving provision in the act or by an order to that effect from the commission itself." (318 Ill. 402, 412.) Shortly after this the Commission adopted General Order 121 which provided that the practices and operations established and maintained by public utilities as of October 28, 1925, in compliance with any municipal ordinances providing for the protection of the health, comfort or safety of employees or the public were to be continued and maintained. In 1937 it adopted General Order 138 which among other things provided "that General Order 121, to the extent that it applies to railroads, should be deemed to be superseded and rescinded by General Order 138."

The Appellate Court opinion assumes that General Order 121 effectively continued the police regulations in the form of city ordinances or regulations. It then construed General Order 138 as rescinding only those railroad ordinance requirements revived by General Order 121 relating to marking, maintenance, contruction and protection of crossings.

The *amici curiae* assert that this holding will put the regulation of railroads in complete chaos. They point out that it will now be necessary for them to determine what regulatory ordinances affecting railroads were passed by every city and village in the State prior to 1926 and then compare these ordinances with the Commerce Commission regulations to learn what their responsibility is in each city and village in the State. They submit that it was to avoid such confusing and overlapping regulation that the Commerce Commission was given exclusive control over railroads.

The Appellate Court in reaching its determination on this point first found that the language "General Order 121, to the extent that it applies to railroads, should be deemed to be superseded and rescinded by General Order 138" is ambiguous. In arriving at the construction to be given this "ambiguous" language it noted that section 67 of the Public Utilities Act requires notice to interested parties and a hearing before an order of the Commission can be altered or amended; that section 69 of the act requires a rescinding order to be based upon findings of fact which in turn must be based upon the evidence presented; that the notice and hearings upon which General Order 138 is based relate only to rules and regulations and requirements relating to the construction, maintenance, marking and protection of crossing of highways and railroads; that the Commission knew of the requirements of sections 67 and 69 of the act and knew of the extent of the notice and hearings upon which General Order 138 is based; and that therefore the Commission only intended to rescind all railroad ordinance requirements covered by General Order 121 relating to marking, maintenance, construction and protection of crossings.

First, we find nothing ambiguous in the language of General Order 138 rescinding General Order 121 to the extent that it applies to railroads. Next, we note that General Order 121 is subject to exactly the same objections advanced against the broad rescinding language of General Order 138. General Order 121 was issued without notice, hearings or testimony. Thus, we have a situation where the rescinded order is subject to the same objections leveled at the broad language of the rescinding order. It follows that if General Order 121 is valid, then General Order 138 validly rescinded it as to railroads; if, however, General Order 138 does not validly rescind General Order 121, then General Order 121 was not effective in the first place. In either event, General Order 121, to the extent it applies to railroads, is no longer effective and was not effective at the time of the accident in this case.

We hold, therefore, that the trial court erred in permitting the admission into evidence and reading to the jury of the ordinances of 1890, 1896, 1897, 1898, 1905, 1906 and 1911. In arguing that this error was prejudicial, the Pennsylvania also points out that quotations from and references to the ordinances occupy more than one half of the amended complaint, that they are referred to or quoted from on nearly one half of the pages of the abstracts, that plaintiff's counsel placed great stress on them in his opening and closing arguments to the jury and that the ordinance of 1897 formed the basis of one instruction. Whether all this emphasis that was placed on the invalid ordinances requires us to grant a new trial depends on the effect such emphasis may have had on the other bases of liability advanced against the Pennsylvania.

A second basis of liability advanced against the Pennsylvania was that it was vicariously liable for the negligence of the Milwaukee. It is well established that where an injury results from the negligent or unlawful operation of a railroad, whether by the owner or by another company authorized or permitted to use the tracks, both

railroad companies are jointly and severally liable for damages to the injured. (*Armstrong* v. *Chicago and Western Indiana Railroad Co.* 350 Ill. 426; *Chicago and Eastern Illinois Railroad Co.* v. *Schmitz,* 211 Ill. 446; *Chicago and Grand Trunk Railway Co.* v. *Hart,* 209 Ill. 414.) It is not disputed that the Milwaukee was the lessee of the Pennsylvania.

The amended complaint charged the Milwaukee with negligent operating the train. The court instructed the jury that the Milwaukee "had no duty to erect and maintain a fence on the premises in question, nor to maintain the walls of said elevation nor to maintain the premises in question." Plaintiff's counsel in his opening and closing statements to the jury said the ordinances applied only to the Pennsylvania and that the Milwaukee had no duty to fence the right of way. A fair reading of the record convinces us that the jury could not have been prejudiced by the stress placed on the ordinances in rendering judgment against the Milwaukee.

There is sufficient evidence in the record from which the jury could find that the train crew on the Milwaukee was negligent and the Pennsylvania does not question this point. Rather, it argues that we should hold as a matter of law that the Edwards boy was guilty of contributory negligence and that this contributory negligence was the sole proximate cause of the accident.

In *Maskaliunas* v. *Chicago and Western Indiana Railroad Co.* 318 Ill. 142, it was said, "The law is clearly established by great weight of authority, that between the ages of seven and fourteen the question of culpability of the child is an open question of fact and must be left to the jury to determine, taking into consideration the age, capacity, intelligence and experience of the child." (318 Ill. 142, 150; see also *Deming* v. *City of Chicago,* 321 Ill. 341; *Wolczek* v. *Public Service Co. of Northern Illinois,* 342 Ill. 482.) Since the Edwards boy was 13 years old at the time of the accident, the question of his negligence must be left to the jury to determine, taking into consideration the age, capacity, intelligence and ex-

perience of the child. Nor can we hold as a matter of law that a minor between the ages of seven and fourteen violated a penal statute (Ill. Rev. Stat. 1957, chap. 114, par. 72,) or penal ordinance. (Chicago, Illinois Municipal Code 1939), chap. 190-3; see *People* v. *Lang*, 402 Ill. 170; *Maskaliunas* v. *Chicago and Western Indiana Railroad Co.*, 318 Ill. 142.) We hold that the question of contributory negligence was properly submitted to the jury and that the jury was properly instructed in the issue as fully explained in the Appellate Court opinion.

The Pennsylvania also argues that the court erred in refusing to give the jury a form of verdict in which it could find the Milwaukee guilty and the Pennsylvania not guilty. The Appellate Court opinion properly disposes of this contention.

This brings us to the third and final basis of liability advanced against the Pennsylvania. Under count II the Pennsylvania was charged with negligent violation of its common-law duty to fence the right of way for the protection of children. The trial court, under count II, gave I.P.I. No. 120.04 covering injury to a trespassing child. The parties have argued strenuously the question of whether the attractive nuisance doctrine applies to the facts disclosed by this case and the Appellate Court considered it at length.

As to the Milwaukee, the court gave I.P.I. No. 120.03 covering injury caused by activities of an occupant of land. Since the liability of the Milwaukee was not based on the attractive nuisance doctrine and since the Pennsylvania is vicariously liable for the negligence of the Milwaukee, we see no reason to consider the applicability of the attractive nuisance doctrine as applied to the Pennsylvania.

For the foregoing reasons the judgment of the Appellate Court, First Judicial District, is affirmed.

Judgment affirmed.

OPINION OF THE SUPREME COURT OF ILLINOIS
Filed March 24, 1966

Docket No. 39074—Agenda 57—January, 1966.

American National Bank and Trust Company, Guardian of the Estate of Henry Lee Edwards, Appellee v. The Pennsylvania Railroad Company *et al.*, Appellants.

MR. JUSTICE HOUSE delivered the opinion of the court:

This action was commenced in the circuit court of Cook County by American National Bank and Trust Company, guardian of the estate of Henry Lee Edwards, a minor, against the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, the Pennsylvania Railroad Company and the Philadelphia, Baltimore and Washington Railroad Company to recover damages for injuries suffered by the Edwards boy when he was run over by one of Milwaukee's trains. The jury returned a verdict against all three defendants in the amount of $275,000 and judgment was entered on the verdict. The Milwaukee paid plaintiff the sum of $75,000 for a covenant not to enforce the judgment against it and the other two defendants appealed to the Appellate Court, First Judicial District. That court affirmed the judgment. (*American National Bank and Trust Co.* v. *Pennsylvania Railroad Co.* 52 Ill. App. 2d 406,) and we granted leave to appeal.

There is no dispute as to the facts which are covered in more detail in the Appellate Court opinion. On June 12, 1959, Henry Edwards and his friend Jose Lopez boarded a tank car on a slow moving Milwaukee freight train and rode it a few blocks to the Van Buren Street underpass on their way to a playground on Van Buren Street. As they were stepping off the train, Edwards bumped into Lopez, fell and suffered traumatic amputation of his legs.

The Philadelphia, Baltimore and Washington Railroad Company is a subsidiary of the Pennsylvania and these

two railroads have been treated throughout these proceedings as a single defendant. They leased to the Milwaukee the track on which the train was operating when the boy was injured.

Count I of the amended complaint charges the Pennsylvania with failure to comply with the fencing requirements of a city of Chicago special contract ordinance passed on January 18, 1897. The ordinance required the accepting railroads to elevate certain portions of their track, to construct underpasses at various intersecting streets and to either build retaining walls for the elevations or enclose them with fences in accordance with the fencing ordinance of 1890. In return, other city ordinances relating to speed, the giving of signals and the maintenance of gates, flagmen, watchmen, signals and signal towers were to be inapplicable where the tracks were elevated. It is not disputed that the ordinance was accepted by the Pennsylvania's predecessors in title, that the track where the accident occurred is elevated and that there is no retaining wall or fence enclosing the elevation.

The Pennsylvania has devoted over one-half of its brief to, and strenuously asserts, five different grounds for holding the ordinance invalid and three grounds for holding it was not applicable to it. An *amici curiae* brief has been filed by nine major railroad companies urging us to reverse that portion of the Appellate Court opinion holding that the ordinance in question is valid and binding on the Pennsylvania.

In 1913 the legislature enacted a Public Utilities Act which became effective January 1, 1914, (Laws of 1913, pp. 459-502,) vesting general supervision over all public utilities, including railroads, in the Public Utilities Commission which, by act of 1921, became the Illinois Commerce Commission. (Laws of 1921, pp. 702-754.) Prior to that time and until 1925, cities and villages regularly enacted ordinances affecting railroad operations. The Chicago speed ordinance of March 26, 1890, (which contains the fencing requirement herein in question) was, for example, re-enacted several times prior to 1922, under

power granted by paragraph 26 of section I of article V of the Cities and Villages Act of 1872. (Ill. Rev. Stat. 1874, chap. 24, par. 62; see *Heiting* v. *Chicago, Rock Island and Pacific Railway Co.* 252 Ill. 466.) In 1925 this court ruled, however, that the legislature by enacting the Public Utility acts of 1913 and 1921 had withdrawn from municipalities their authority to pass new or enforce existing ordinances which related to public utilities. (*Village of Atwood* v. *Cincinnati, Indianapolis and Western Railroad,* 316 Ill. 425; *Northern Trust Co.* v. *Chicago Railways Co.* 318 Ill. 402.) This holding was also applied where the ordinance was of a special contract nature. (*City of Chicago* v. *Commerce Com. ex rel. Chicago and Western Indiana Railroad Co.* 356 Ill. 501; *City of Chicago* v. *Chicago and North Western Railway Co.* 4 Ill. 2d 307.) Furthermore, since 1957 the Commerce Commission has been given explicit authority to regulate right-of-way fences. Ill. Rev. Stat., 1957, chap. 111⅔, par. 61.

The Appellate Court, while recognizing the above holding by this court, nevertheless held the ordinance valid by its interpretation of the Commerce Commission's General Orders 121 and 138. In the 1925 *Northern Trust* case this court stated, "If it had been deemed wise or necessary, municipal ordinances and police regulations relating to public utilities could have been continued in force until the commission acted, by a saving provision in the act or by an order to that effect from the commission itself." (318 Ill. 402, 412.) Shortly after this the Commission adopted General Order 121 which provided that the practices and operations established and maintained by public utilities as of October 28, 1925, in compliance with any municipal ordinances providing for the protection of the health, comfort or safety of employees or the public were to be continued and maintained. In 1937 it adopted General Order 138 which among other things provided "that General Order 121, to the extent that it applies to railroads, should be deemed to be superseded and rescinded by General Order 138."

The Appellate Court opinion assumes that General Order 121 effectively continued the police regulations in the form of city ordinances or regulations. It then construed General Order 138 as rescinding only those railroad ordinance requirements revived by General Order 121 relating to marking, maintenance, construction and protection of crossings.

The *amici curiae* assert that this holding will put the regulation of railroads in complete chaos. They point out that it will now be necessary for them to determine what regulatory ordinances affecting railroads were passed by every city and village in the State prior to 1926 and then compare these ordinances with the Commerce Commission regulations to learn what their responsibility is in each city and village in the State. They submit that it was to avoid such confusing and overlapping regulation that the Commerce Commission was given exclusive control over railroads.

The Appellate Court in reaching its determination on this point first found that the language "General Order 121, to the extent that it applies to railroads, should be deemed to be superseded and rescinded by General Order 138" is ambiguous. In arriving at the construction to be given this "ambiguous" language it noted that section 67 of the Public Utilities Act requires notice to interested parties and a hearing before an order of the Commission can be altered or amended; that section 69 of the act requires a rescinding order to be based upon findings of fact which in turn must be based upon the evidence presented; that the notice and hearings upon which General Order 138 is based relate only to rules and regulations and requirements relating to the construction, maintenance, marking and protection of crossing of highways and railroads; that the Commission knew of the requirements of section 67 and 69 of the act and knew of the extent of the notice and hearings upon which General Order 138 is based; and that therefore the Commission only intended to rescind all railroad ordinance requirements covered by General Order 121 relating to marking, maintenance, construction and protection of crossings.

First, we find nothing ambiguous in the language of General Order 138 rescinding General Order 121 to the extent that it applies to railroads. Next, we note that General Order 121 is subject to exactly the same objections advanced against the broad rescinding language of General Order 138. General Order 121 was issued without notice, hearings or testimony. Thus, we have a situation where the rescinded order is subject to the same objections leveled at the broad language of the rescinding order. It follows that if General Order 121 is valid, then General Order 138 validly rescinded it as to railroads; if, however, General Order 138 does not validly rescind General Order 121, then General Order 121 was not effective in the first place. In either event, General Order 121, to the extent it applies to railroads, is no longer effective and was not effective at the time of the accident in this case.

We hold, therefore, that the trial court erred in permitting the admission into evidence and reading to the jury of the ordinances of 1890, 1896, 1897, 1898, 1905, 1906 and 1911. In arguing that this error was prejudicial, the Pennsylvania also points out that quotations from and references to the ordinances occupy more than one half of the amended complaint, that they are referred to or quoted from on nearly one half of the pages of the abstracts, that plaintiff's counsel placed great stress on them in his opening and closing arguments to the jury and that the ordinance of 1897 formed the basis of one instruction.

Plaintiff argues that if liability cannot be based on a breach of the ordinance requiring fencing, the judgment should nevertheless be affirmed if the general verdict can be sustained under any other ground of liability relied upon in the complaint. Plaintiff points out that a second basis of liability advanced against the Pennsylvania was that it was vicariously liable for the negligence of the Milwaukee and a third basis of liability was that the Pennsylvania breached its common-law duty to fence the right of way for the protection of chil-

dren. In short, plaintiff asserts that the judgment should be affirmed if there is evidence to support either of these alternative bases of liability.

It is true, and plaintiff recognizes, that liability cannot be based on breach of the ordinances which we find to be void. The point that plaintiff chooses to ignore, however, is that the introduction of the ordinances, the strong emphasis placed on their breach and the instruction that they were valid was highly prejudicial to the Pennsylvania.

In considering whether the jury would have reached the same result if the highly prejudicial evidence had not been admitted we must deal with practicalities. We feel that fairness requires a new trial. The judgments are reversed and the cause remanded for a new trial.

Reversed and remanded.

OPINION OF THE SUPREME COURT OF ILLINOIS
Filed June 16, 1966

Docket No. 39074—Agenda 32—May, 1966.

American National Bank and Trust Company, Guardian of the Estate of Henry Lee Edwards, Appellee v. The Pennsylvania Railroad Company *et al.*, Appellants.

MR. JUSTICE HOUSE delivered the opinion of the court:

This action was commenced in the circuit court of Cook County by American National Bank and Trust Company, guardian of the estate of Henry Lee Edwards, a minor, against the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, the Pennsylvania Railroad Company and the Philadelphia, Baltimore and Washington Railroad Company to recover damages for injuries suffered by the Edwards boy when he was run over by one of Milwaukee's trains. The jury returned a verdict against all three defendants in the amount of $275,000 and judgment was entered on the verdict. The Milwaukee paid plaintiff the sum of $75,000 for a covenant not to enforce the judgment against it and the other two defendants appealed to the Appellate Court, First Judicial District. That court affirmed the judgment, (*American National Bank and Trust Co.* v. *Pennsylvania Railroad Co.*, 52 Ill. App. 2d 406,) and we granted leave to appeal.

There is no dispute as to the facts which are covered in more detail in the Appellate Court opinion. On June 12, 1959, Henry Edwards and his friend Jose Lopez boarded a tank car on a slow moving Milwaukee freight train and rode it a few blocks to the Van Buren Street underpass on their way to a playground on Van Buren Street. As they were stepping off the train, Edwards bumped into Lopez, fell and suffered traumatic amputation of his legs.

The Philadelphia, Baltimore and Washington Railroad Company is a subsidiary of the Pennsylvania and

these two railroads have been treated throughout these proceedings as a single defendant. They leased to the Milwaukee the track on which the train was operating when the boy was injured.

Count I of the amended complaint charges the Pennsylvania with failure to comply with the fencing requirements of a city of Chicago special contract ordinance passed on January 18, 1897. The ordinance required the accepting railroads to elevate certain portions of their track, to construct underpasses at various intersecting streets and to either build retaining walls for the elevations or enclose them with fences in accordance with the ordinance of 1890. In return, other city ordinances relating to speed, the giving of signals and the maintenance of gates, flagmen, watchmen, signals and signal towers were to be inapplicable where the tracks were elevated. It is not disputed that the ordinance was accepted by the Pennsylvania's predecessors in title, that the track where the accident occurred is elevated and that there is no retaining wall or fence enclosing the elevation.

The Pennsylvania has devoted over one-half of its brief to, and strenuously asserts, five different grounds for holding the ordinance invalid and three grounds for holding it was not applicable to it. An *amici curiae* brief has been filed by nine major railroad companies urging us to reverse that portion of the Appellate Court opinion holding that the ordinance in question is valid and binding on the Pennsylvania.

In 1913 the legislature of this State enacted a Public Utilities Act which became effective January 1, 1914, (Laws of 1913, pp. 459-502,) vesting general supervision over all public utilities, including railroads, in the Public Utilities Commission which, by act of 1921, became the Illinois Commerce Commission. (Laws of 1921, pp. 702-754,) Prior to that time and until 1925, cities and villages regularly enacted ordinances affecting railroad operations. The Chicago speed ordinance of March 26, 1890, (which contains the fencing requirements herein in question) was, for example, re-enacted several times prior to 1922, un-

der power granted by paragraph 26 of section I of article V of the Cities and Villages Act of 1872. (Ill. Rev. Stat. 1874, chap. 24, par. 62; see *Heiting* v. *Chicago Rock Island and Pacific Railway Co.* 252 Ill. 466.) In 1925 this court ruled, however, that the legislature by enacting the Public Utility acts of 1913 and 1921 had withdrawn from municipalities their authority to pass new, or enforce existing, ordinances which related to public utilities. (*Village of Atwood* v. *Cincinnati, Indianapolis and Western Railroad,* 316 Ill. 425; *Northern Trust Co.* v. *Chicago Railways Co.* 318 Ill. 402.) This holding was also applied where the ordinance was of a special contract nature. (*City of Chicago* v. *Commerce Com. ex rel. Chicago and Western Indiana Railroad Co.* 356 Ill. 501; *City of Chicago* v. *Chicago and North Western Railway Co.* 4 Ill. 2d 307.) Furthermore, since 1957 the Commerce Commission has been given explicit authority to regulate right-of-way fences. Ill. Rev. Stat. 1957, chap. 111⅔, par. 61.

The Appellate Court, while recognizing the above holding by this court, nevertheless held the ordinance valid by its interpretation of the Commerce Commission's General Orders 121 and 138. In the 1925 *Northern Trust* case this court stated, "If it had been deemed wise or necessary; municipal ordinances and police regulations relating to public utilities could have been continued in force until the commission acted, by a saving provision in the act or by an order to that effect from the commission itself," (318 Ill. 402, 412.) Shortly after this the Commission adopted General Order 121 which provided that the practices and operations established and maintained by public utilities as of October 28, 1925, in compliance with any municipal ordinances providing for the protection of the health, comfort or safety of employees or the public were to be continued and maintained. In 1937 it adopted General Order 138 which among other things provided "that General Order 121, to the extent that it applies to railroads, should be deemed to be superseded and rescinded by General Order 138."

The Appellate Court opinion assumes that General Order 121 effectively continued the police regulations in

the form of city ordinances or regulations. It then construed General Order 138 as rescinding only those railroad ordinance requirements revived by General Order 121 relating to marking, maintenance, construction and protection of crossings.

The *amici curiae* assert that this holding will put the regulation of railroads in complete chaos. They point out that it will now be necessary for them to determine what regulatory ordinances affecting railroads were passed by every city and village in the State prior to 1926 and then compare these ordinances with the Commerce Commission regulations to learn what their responsibility is in each city and village in the State. They submit that it was to avoid such confusing and overlapping regulation that the Commerce Commission was given exclusive control over railroads.

The Appellate Court in reaching its determination on this point first found that the language "General Order 121, to the extent that it applies to railroads, should be deemed to be superseded and rescinded by General Order 138" is ambiguous. In arriving at the construction to be given this "ambiguous" language it noted that section 67 of the Public Utilities Act requires notice to interested parties and a hearing before an order of the Commission can be altered or amended; that section 69 of the act requires a rescinding order to be based upon findings of fact which in turn must be based upon the evidence presented; that the notice and hearings upon which General Order 138 is based relate only to rules and regulations and requirements relating to the construction, maintenance, marking and protection of crossing of highways and railroads; that the Commission knew of the requirements of sections 67 and 69 of the act and knew of the extent of the notice and hearings upon which General Order 138 is based; and that therefore the Commission only intended to rescind all railroad ordinance requirements covered by General Order 121 relating to marking, maintenance, construction and protection of crossings.

First, we find nothing ambiguous in the language of General Order 138 rescinding General Order 121 to the extent that it applies to railroads. Next, we note that General Order 121 is subject to exactly the same objections advanced against the broad rescinding language of General Order 138, General Order 121 was issued without notice, hearings or testimony. Thus, we have a situation where the rescinded order is subject to the same objections leveled at the broad language of the rescinding order. It follows that if General Order 121 is valid, then General Order 138 validly rescinded it as to railroads; if, however, General Order 138 does not validly rescind General Order 121, then General Order 121 was not effective in the first place. In either event, General Order 121, to the extent it applies to railroads, is no longer effective and was not effective at the time of the accident in this case.

We hold, therefore, that the trial court erred in permitting the admission into evidence and reading to the jury of the ordinances of 1890, 1896, 1897, 1898, 1905, 1906 and 1911. In arguing that this error was prejudicial, the Pennsylvania also points out that quotations from and references to the ordinances occupy more than one half of the amended complaint, that they are referred to or quoted from on nearly one half of the pages of the abstracts, that plaintiff's counsel placed great stress on them in his opening and closing arguments to the jury and that the ordinance of 1897 formed the basis of one instruction. Whether all this emphasis that was placed on the invalid ordinances requires us to grant a new trial depends on the effect such emphasis may have had on the other bases of liability advanced against the Pennsylvania.

A second basis of liability advanced against the Pennsylvania was that it was vicariously liable for the negligence of the Milwaukee. It is well established that where an injury results from the negligent or unlawful operation of a railroad, whether by the owner or by another company authorized or permitted to use the tracks, both railroad companies are jointly and severally liable

for damages to the injured. (*Armstrong* v. *Chicago and Western Indiana Railroad Co.* 350 Ill. 426; *Chicago and Eastern Railroad Co.* v. *Schmitz,* 211 Ill. 446; *Chicago and Grand Trunk Railway Co.* v. *Hart,* 209 Ill. 414.) It is not disputed that the Milwaukee was the lessee of the Pennsylvania.

The amended complaint charged the Milwaukee with negligently operating the train. The court instructed the jury that the Milwaukee "had no duty to erect and maintain a fence on the premises in question, nor to maintain the walls of said elevation nor to maintain the premises in question." Plaintiff's counsel in his opening and closing statements to the jury said the ordinances applied only to the Pennsylvania and that the Milwaukee had no duty to fence the right of way. A fair reading of the record convinces us that the jury could not have been prejudiced by the stress placed on the ordinances in rendering judgment against the Milwaukee.

There is sufficient evidence in the record from which the jury could find that the train crew on the Milwaukee was negligent and the Pennsylvania does not question this point. Rather, it argues that we should hold as a matter of law that the Edwards boy was guilty of contributory negligence and that this contributory negligence was the sole proximate cause of the accident.

In *Maskaliunas* v. *Chicago and Western Indiana Railroad Co.* 318 Ill. 142, it was said, "The law is clearly established by great weight of authority, that between the ages of seven and fourteen the question of culpability of the child is an open question of fact and must be left to the jury to determine, taking into consideration the age, capacity, intelligence and experience of the child." (318 Ill. 142, 150; see also *Deming* v. *City of Chicago,* 321 Ill. 341; *Wolczek* v. *Public Service Co. of Northern Illinois,* 342 Ill. 482.) Since the Edwards boys was 13 years old at the time of the accident, the question of his negligence must be left to the jury to determine, taking into consideration the age, capacity, intelligence and experience of the child. Nor can we hold as a matter of law that a minor

between the ages of seven and fourteen violated a penal statute (Ill. Rev. Stat. 1957, chap. 114, par. 72,) or penal ordinance. (Chicago, Illinois Municipal Code 1939, chap. 190-3; see *People* v. *Lang*, 402 Ill. 170; *Maskaliunas* v. *Chicago and Western Indiana Railroad Co.* 318 Ill. 142.) We hold that the question of contributory negligence was properly submitted to the jury and that the jury was properly instructed on the issue as fully explained in the Appellate Court opinion.

The Pennsylvania also argues that the court erred in refusing to give the jury a form of verdict in which it could find the Milwaukee guilty and the Pennsylvania not guilty. The Appellate Court opinion properly disposes of this contention.

This brings us to the third and final basis of liability advanced against the Pennsylvania. Under count II the Pennsylvania was charged with negligent violation of its common-law duty to fence the right of way for the protection of children. The trial court, under count II, gave I.P.I. No. 120.04 covering injury to a trespassing child. The parties have argued strenuously the question of whether the attractive nuisance doctrine applies to the facts disclosed by this case and the Appellate Court considered it at length.

As to the Milwaukee, the court gave I.P.I. No. 120.03 covering injury caused by activities of an occupant of land. Since the liability of the Milwaukee was not based on the attractive nuisance doctrine and since the Pennsylvania is vicariously liable for the negligence of the Milwaukee, we see no reason to consider the applicability of the attractive nuisance doctrine as applied to the Pennsylvania.

For the foregoing reasons the judgment of the Appellate Court, First Judicial District, is affirmed.

Judgment affirmed.

OPINION OF APPELLATE COURT OF ILLINOIS
Filed May 14, 1964

49221

AMERICAN NATIONAL BANK AND TRUST COMPANY, a corporation, Guardian of the Estate of HENRY LEE EDWARDS, a minor.

Plaintiff-Appellee,

v.

THE PENNSYLVANIA RAILROAD COMPANY, a corporation; THE PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, a corporation,

Defendants-Appellants,

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a corporation,

Defendant.

APPEAL FROM CIRCUIT COURT COOK COUNTY

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT;

This is an action to recover damages for personal injuries suffered by a thirteen year old boy when he was run over by a Chicago, Milwaukee, St. Paul and Pacific Railroad Company train and suffered a traumatic amputation of both his legs. Suit was brought against three railroads The Chicago, Milwaukee, St. Paul & Pacific Railroad Company, hereinafter referred to as the Milwaukee Railroad, the Pennsylvania Railroad Company and the Philadelphia, Baltimore & Washington Railroad Company, hereinafter jointly referred to as the Pennsylvania Railroads. Henry Lee Edwards, the minor on whose behalf this suit was instituted, shall be referred to as the plaintiff.

The amended complaint contained two counts. Count I charged the Pennsylvania Railroads with failure to comply with the fencing requirements of a City of Chicago special ordinance passed on January 18, 1897, and the Milwaukee Railroad with proximately contributing to plaintiff's injuries through the negligent operation of its train. Count II charged the Pennsylvania Railroads with common law negligence in failing to take reasonable precautions where serious harm to children was foreseeable, and the Milwaukee Railroad again with proximately contributing to plaintiff's injuries through the negligent operation of its train.

The jury returned a general verdict for the plaintiff against all three defendants for $275,000 and the court entered judgment on the verdict. Post-trial motions on behalf of all the defendants were denied. The Milwaukee Railroad has paid the plaintiff the sum of $75,000 for a covenant not to enforce the judgment against it. The Pennsylvania Railroads bring this appeal.

The accident occurred on June 12, 1959, on an elevated railroad embankment at Rockwell and Van Buren Streets in the City of Chicago. There were five railroad tracks on the embankment where the accident occurred, which ran in a north-south direction. The two easterly tracks were owned and controlled by the appellants and they operated their trains on those tracks. On a user basis, charging so much per car, appellants also leased these tracks to a number of other railroads, including the Milwaukee Railroad. The accident occurred on Pennsylvania track two, the second track from the east. The third and fourth tracks from the east were owned by the Chicago and Northwestern Railroad, and it and other railroads used those tracks. The fifth or most westerly track was little used and is not involved here. Each track passes between large girders as it crosses over each underpass; these girders are six or seven feet high and about a foot and a half wide. The distance between the running board of a tank car and the top of one of the girders is only four to six inches.

Van Buren and Rockwell Streets, where the tracks in question are located, are in a heavily populated area of the City of Chicago; this has been the condition for many years. Within a few years prior to the accident in 1959, a housing project containing eight to ten story buildings has been constructed immediately east of the railroad tracks between Van Buren Street on the south and Jackson Boulevard on the north; there were a number of large apartment buildings in that area between the railroad tracks on the west and Western Avenue on the east. For many years a much used public playground was located immediately west of the railroad elevation, on the south side of Congress Street. Congress Street is a short block south of Van Buren Street. This large playground, known as Altgeld Park, contained several ball fields, swings and other playground equipment, and was extremely popular in that neighborhood. A lighting system had been provided and the playground was used in the evenings as well as in the daytime.

Trains often stopped or moved very slowly through the area in question because of heavy train traffic, switching or stopboard signals. Trains sometimes moved at speeds as slow as a walk. The speed was limited to 15 or 20 miles an hour.

For many years youngsters ranging in age from about six to sixteen years of age frequently went up a pathway on the east side of the sloping embankment at the north side of Van Buren Street. From there the children went southwards upon the elevation and crossed over Congress (now the Eisenhower) Expressway to the playground, or went north by the same route from the playground to Van Buren Street or Jackson Boulevard. This occurred daily. The youngsters played on the tracks and often climbed on the standing trains, or got on slowly moving trains, rode a short distance, jumped off, and had a good time.

This use of the elevation between Jackson Boulevard and Congress Street as a means of passage to and from the playground became more extensive after Congress Expressway was built and fenced on both sides because

the only way youngsters could go to the playground from the north side of Van Buren Street near Rockwell Street was either by using the direct route along the elevated embankment as a passageway, or by going an extra half mile via the bridges or crossings at Western or California Avenues.

The daily use of the elevated embankment and the tracks by the children, and their climbing on standing cars and riding on the side of the slow moving cars, had been going on for at least 25 years prior to the occurrence. This use of the elevation by the children was more extensive after school hours in warmer weather and throughout the day during vacations.

Salvatore Sparachio testified that he owned and operated a screw machine plant on the south side of Harrison Street, a short distance west of the tracks. He was born in that neighborhood and grew up there. After he moved to a home elsewhere, he continued to operate his business at Harrison and Rockwell Streets. He described the physical conditions in the area. He was 35 years old, and from the time he had been about twelve years old, children had gone on the railroad elevation and tracks between Harrison and Van Buren Street. He had been up on the tracks himself when he was a youngster, lots of times, had walked on and crossed over the tracks many times, and during the years had seen other boys do the same thing, down until June, 1959. The children were up on the elevation and tracks daily during the summertime. The children played on the tracks, got on trains as they were passing through and jumped off, having a good time. Mr. Sparachio stated that at no time prior to June 12, 1959, was there a fence erected on the east side of the railroad tracks along the north side of Van Buren Street. He had called up the Northwestern Railroad police to tell them about children on the tracks, and children jumping on and off trains.

Hugo R. Koehler, of Skokie, Illinois, retired, testified that he was a conductor for the Baltimore and Ohio Railroad for about 35 years. On trips for the Baltimore and

Ohio over this stretch of tracks at Van Buren and Rockwell, he usually rode in the caboose on the northbound trip from 14th and Robey [Damen] to the St. Paul at Grand Avenue and Western between 1:00 and 1:30 in the afternoon. They would arrive there about 2:00, and would leave there about 2:30 or 3:00 in the afternoon, southbound to 14th and Robey [Damen]. These trips were on the No. 1 or most easterly track going north, and the No. 2, second from the east (Pennsylvania track), going south. He made these trips daily between the years 1956 and 1960. On the trip northbound he very seldom saw "kids" up there on the right of way, but coming back in the afternoon around 3:30 or 4:00 P.M., they would see quite a number of children up there trying to get on trains. When the "kids" were getting on or off the trains, the speed would be pretty slow, around four or five miles an hour. These children would be on the right of way, and looking at you, and throwing stones, and sometimes there would be little tots asking for chalk. Neither he nor his men ever gave them any chalk but they sometimes did use chalk as part of their job in the railroad yards. The children would get on the side of a car or the caboose, would get on and off, and get on and off again. They (the railroad men) would be very careful when they saw the children, would tell them to keep off the cars, and would be very careful when they told them to get off because they (the children) get scared and might jump off before getting to the bridge (the girders) and that is where they could get caught. Ordinarily, the youngsters would get off when they were told to, and naturally some youngsters wouldn't, would start to try to kid, but usually, if they (the railroad men) were close to them, the children would get off the cars.

The children rode on all kinds of foreign trains, the New York Central, the Soo Line, various railroads. This was true both on the Pennsylvania and the Northwestern trains. Koehler saw children getting on and off trains in that area for several years. If he saw children there, he would tell them to get off the right of way and not to flip

the trains, and would try to explain how dangerous it was to get on the train because of the girders. If the children were on another train or in the middle of Koehler's train, that would scare the railroad men because they couldn't holler at the children or warn them. He reported to his own company, to the Baltimore and Ohio, that there were children on the tracks, and had no doubt that he mentioned it to the yardmaster of the Chicago, Milwaukee and St. Paul Railroad at Western Avenue, told them that there were a lot of kids there. He testified at an inquest in August, 1957, at the County Morgue that he had frequently seen children playing up on the tracks in that area.

Henry Lee Edwards, the plaintiff, was born January 2, 1946, and in June, 1959, when injured, was approximately thirteen years and five months old. He was in the lower half of seventh grade, called 7-B, in Manley Elementary School. His health, eyesight and hearing were good, and he was not crippled or deformed in any way before the accident; he was of average intelligence. Before he was injured, he was a member of a regular boy scout troop, played baseball in a league and was a patrol boy.

The plaintiff had been up on the elevation at Rockwell previously, and he stated the conditions shown in the various photographs were that way as long as he had known them. He usually walked up the path on the east side of the embankment, just north of Van Buren to get to the playground. If this passage on the elevation wasn't used to get there, it required a trip of a half mile, using the crossing at Western or California Avenue. The boys going over to the playground or coming back home from it took the short cut on the railroad embankment. To Henry Edwards' knowledge, children used that elevated embankment every day before he was hurt. When up on the elevation, the children would wave at the railroad men and ask for chalk. Sometimes the railroad men would throw chalk out the window, and sometimes they said they didn't have any. At times Edwards saw children on the railroad cars while the cars were moving or standing. Children used to hop on the trains, ride about a block and jump off. At times the trains

would stop and railroad men would get on or off. The kids would climb the ladders and jump.

During the four years that Henry Edwards played on the elevation and used that path to go to the playground or to go back home, a man spoke to him on one occasion about not going up there. He thought that was about a year and half before he was injured. The man, who had seen Edwards coming through the fence at the playground, told Henry and the boy with him that they shouldn't be up there. He said nothing further, and nothing about danger. Henry stayed off the elevation for two or three days, but the other boys were still going up there, and some of them were friends of his, and he started to go up there again. He had never gotten on any railroad cars while they were standing or moving before the day of the accident.

On June 12, 1959, when he was injured, Edwards and a friend, Lopez, were on their way to the playground to play ball. The accident happened on a school day and the plaintiff attended school in the morning. There were classes in the afternoon but he did not attend; it was a hot day and he went swimming at a public swimming pool with some boys he knew. Then he went home, then went to the house of a friend, Jose Lopez, and they were on their way to the playground to play baseball. Lopez was fourteen or fifteen years old, and he was taller and bigger than Henry Edwards. They attended the same school and were in the same grade. Edwards and Lopez went up the pathway at Van Buren and Rockwell, using the pathway leading from the public sidewalk up to the stone wall at the point where a large stone was missing, just north of Van Buren Street, on the east side of the railroad tracks. When they got up on the tracks, Lopez and Edwards started towards the park and then they saw a train approching, going north, on Pennsylvania track 1. Lopez jumped onto a ladder of one of the cars. After he saw Lopez get on, Henry Edwards also got on, and they both rode the slow moving freight train about two blocks, to about Adams Street. There they jumped off and started playing around and then headed back towards the playground.

Just before he was injured, Henry Edwards got on a southbound Milwaukee Railroad freight train consisting of about ten or twelve cars. It was on Pennsylvania track 2, the second track from the east. The two boys were walking back to the playground, going south, when they heard this southbound train approaching. No bell was rung or whistle blown. The boys were just west of track 2, and when the engine got close, they stepped out of the way and stopped, facing towards the train. The train was going very slow. The window was open on the engineer's side, and he was there in the cab. They waved at him and he waved back, but there was no conversation. Lopez got on the tank car which was right in front of the caboose, at the back end of the train, and Henry followed him. There was a place (boardwalk) on the tank car where one could stand and hold on and walk around. Both boys got on that car and rode down to the girders at Van Buren Street, holding onto a (horizontal) pipe. They were standing on the west side of the car and the caboose was right behind them. It was about 5:15 P.M.

The boys were standing on the boardwalk which extends around the tank car, and when they got to the girders at Van Buren Street, the top of the girder was about one-half foot higher than the boardwalk around the tank car, and there was about six inches space between the tank car and the girder. The girders are about a foot and one-half wide on top.

As the tank car was slowly passing alongside the girders at Van Buren Street, Lopez jumped onto the girder to the west of the train. The plaintiff followed him, somewhere about the middle of the girder, and got onto the girder all right. The girder was dry. Edwards was then going to jump down to the ground on the other or west side of the girder but never got to do that. He bumped into Lopez, lost his balance, and fell down on the east side of the girder between the girder and the train. The next thing he remembers was coming to in the Illinois Research Hospital. He had suffered the complete traumatic amputation of his left leg about 4 to 5 inches below the top

of the hip bone. The leg was brought to the hospital in a bushel basket. He also suffered the loss of his right leg about three inches below the knee. It was attached only by skin, about an inch wide, when Henry arrived at the hospital, and the amputation was completed there.

Emil Hessert, a witness for defendants, employed as a police lieutenant by the Pennsylvania Railroad, testified that his duties took him into the area of Rockwell and Van Buren Streets. He stated his job was to protect the property of the railroads and merchandise in the trains, but that he warns people off the property, in the majority of cases juveniles, and if the boys are "flipping trains" or stoning trains, he takes their names and addresses and takes them to their homes or the police station. He covered an area including various yards during each tour of duty, amounting to 30 to 37 miles, sometimes on foot and sometimes in his automobile. He couldn't drive alongside the railroad tracks in question from Jackson to Congress Street and therefore, when he got to Jackson he drove west to California, a quarter-mile from the tracks, south to Congress Street, then east to a point near the tracks, where he parked and sat in his car for about one-half hour. He did not patrol the area in question from Jackson and Rockwell to Van Buren and Rockwell. He would then go to the 59th Street yard at 59th and Leavitt, a big classification yard, and check on shipments of cigarettes, liquor and especially valuable merchandise. In all, each day he covered several railroad yards, many miles of track, checked many trains, and checked on the work of his subordinates at certain yards. Sometimes he gets tied up on special calls, any one of which may be for a full day, as when the seal has been broken on a car with valuable merchandise, and where some of the mechandise is missing. These special assignments take priority. Hessert testified that during the periods he was there at Congress Street, he saw children on the right of way at Van Buren Street on several occasions, and also on the right of way opposite the playground, and has seen children moving south on the railroad right of way to get from Van Buren Street

to the playground, or coming back from the playground going north. That had been true all during the period that he was there.

There were "No Trespassing" signs posted in the area but they did not remain standing. Sometimes they would be there for one day, sometimes for a week before they were no longer standing.

Gerald W. Hipskind, a witness for defendants, a policeman for the Chicago and Northwestern Railroad Company, testified that he patrolled the elevation daily and that his duties took him into the area of Van Buren and Rockwell Streets; that he visited the elevation during the noon hour on June 12, 1959, and at 3:00 P.M., when children are released from school. He said he saw Henry Edwards and another boy on October 17, 1958, on the Northwestern tracks in the vicinity of the Congress Street bridge, talked to them and explained the dangers, told them how easy it was for them to lose their arms or legs by jumping on or off trains, and warned them against playing on the tracks in the future, took their names and addresses and the names of their parents and the schools they attended, "released them," and then made a report. During the years he worked there, children of various ages, from six to sixteen years, would go up on the railroad tracks. He testified he was in the area of Rockwell Street several times a week, would park his car at Jackson, enter the elevation at Jackson Boulevard, walk south to Congress Street and back to Jackson. He said he would be there every day all during the school year, during the lunch period, and then from 3:00 to 5:00 P.M., walking back and forth on top of the railroad right of way, patrolling from Madison Street to the playground, even on poor days in the wintertime when it was snowing or sleeting or raining, all the year round. He testified that he found Edwards and another boy on the Northwestern tracks in the vicinity of Congress Street, something that a lot of kids had done for 17 years as far as he knew. He did not remember what these two boys were doing on that day, or whether they tried to run toward him or away from him, and could not remember

the words he spoke to them except that he had a procedure he followed. He could not remember what he actually said to Henry Edwards on the day referred to in 1958. Edwards denied that Hipskind warned him about getting on trains. He had not been on any train.

Count II of the complaint is based upon the case of *Kahn* v. *James Burton Co.*, 5 Ill. 2d 614, and charges the Pennsylvania Railroads with the negligent violation of their common law duty to use reasonable care to protect children from injury by reason of activities and conditions hazardous and dangerous to youngsters who were likely to go upon the property of the defendants. The rule in the Kahn case was stated by the Court at p. 625: "* * * where the owner or person in possession knows, or should know, that young children habitually frequent the vicinity of a defective structure or dangerous agency existing on the land, which is likely to cause injury to them because they, by reason of their immaturity, are incapable of appreciating the risk involved, and where the expense or inconvenience of remedying the condition is slight compared to the risk to the children [, then] * * * there is a duty upon the owner or person in possession and control of the premises to exercise due care to remedy the condition or otherwise protect the children from injury resulting from it. (*Wagner* v. *Kepler*, 411 Ill. 368.) The element of attraction is significant only insofar as it indicates that the trespass should be anticipated, the true basis of liability being the foreseeability of harm to the child. Whether the lumber pile was sufficiently attractive to entice children into climbing upon it, whether its condition would involve danger from such activity, and whether the contractor should have anticipated the probability of the accident, were matters for determination by the jury. *City of Pekin* v. *McMahon*, 154 Ill. 141." Plaintiff contends that defendants-appellants violated this duty by reason of their failure to fence the area between the northwest Van Buren Street underpass wall and the existing fence erected by the Chicaro Housing Authority paralleling the elevation.

Defendants maintain that a moving railroad train does not fall within the category of "a defective structure or dangerous agency existing upon the land" as a matter of law and that therefore the *Kahn* case has no application to the case at bar; and that, rather than the *Kahn* case, the case of *Briney* v. *Illinois Central RR. Co.*, 401 Ill. 181, and *Jones* v. *Schmidt*, 349 Ill. App. 336, are controlling here.

The *Kahn* case involved a child who was playing on a pile of lumber at a building construction site; the pile toppled over and one of the heavy boards fell on the child's back fracturing his spine. Plaintiff there proceeded on the attractive nuisance theory, but the Court refused to accept this theory as the basis for liability, because, as it stated at p. 624: "The naming or labeling of a certain set of facts as being an 'attractive nuisance' case or a 'turntable' case has often led to undesirable conclusions. The inclination is then to find a *stare decisis* pigeonhole or category. The difficulty in such procedure is that too often the result of such a search is the reaching of irreconcilable conclusions." After noting the conflict which has resulted in the cases due to the attempt to categorize a particular set of facts, the Court concluded: "In view of the foregoing conflict and the fact that, as many courts have declared, a child in his youthful fancy, imagination and ingenuity can make a plaything of almost anything and is attracted by almost everything, the only proper basis for decision in such cases dealing with personal injuries to children are the customary rules of ordinary negligence cases."

The import of the *Kahn* case is clear. Were we to accept defendants' distinction between objects in motion and stationary objects, the net result would be to "pigeonhole a certain set of facts" and thereby defeat the purpose behind the *Kahn* rule. Again, the plaintiff proceeds under the *Kahn* rule and not, as defendants here contend, under the attractive nuisance doctrine. The *Kahn* case has adopted the theory of "foreseeability of harm to the child" as the true basis of liability. The element of attraction is important only insofar as it indicates that a trespass should have been anticipated by the owner or the posses-

sor of the land and the question of whether the object involved was attractive so as to entice children upon it is a question for the jury. Under the facts of this case a jury could reasonably have found that the moving railroad train was sufficiently attractive to entice children into climbing upon it, that its condition would involve danger from such activity, and that the defendants should have anticipated the probability of the accident. We therefore are of the opinion that an injury to a child caused by a moving railroad train can come within the scope of the *Kahn* rule.

Defendants rely on the cases of *Briney* v. *Illinois Central RR. Co.*, 401 Ill. 181, and *Jones* v. *Schmidt*, 349 Ill. App. 336, as controlling here. The *Briney* case involved an eight year old child who was injured while attempting to hitch a ride on a moving train. The court held that, even though the child was on the defendant's property by consent, he exceeded the scope of his invitation by attempting to jump aboard the train and was therefore a trespasser. The case was decided seven years before the *Kahn* case and was not tried on the attractive nuisance theory which was then the law in Illinois but rather on the novel theory that the plaintiff was on the defendant's property to help the railroad men do their work. The court in the *Kahn* case noted the *Briney* decision, but then in effect stated that it did not apply where harm from an object on the land was foreseeable to children who were enticed upon the land by the allurement of the object. The *Jones* case also involved the questions of invitation and trespass by exceeding the scope of the invitation and was not tried on the attractive nuisance theory. *Jones* was decided three years prior to the *Kahn* case. In neither *Jones* nor *Briney* was the question of foreseeable trespass raised as it was in the *Kahn* case and here. Secondly, the court in the *Kahn* case was not concerned with trespass as a bar to recovery in cases involving personal injuries to children where the trespass is foreseeable: "The element of attraction is significant only in so far as it indicates that the trespass should be anticipated, the true basis of liability being the foreseeability of

harm to the child." *Kahn* v. *Burton Co.*, 5 Ill. 2d 614, 625. The plaintiffs in the *Briney* and *Jones* cases, on the other hand, were denied recovery due to the element of trespass. The *Kahn* rule must therefore take precedence over the *Briney* and *Jones* cases where trespass by children and resulting harm are foreseeable.

Defendants further contend that the trial court erred in refusing to direct a verdict in their favor on the grounds that plaintiff's claim was barred as a matter of law for the reason that he had violated a statute which prohibits the unpermitted climbing onto a moving railroad train. (Ill. Rev. Stat. 1961, Chap. 114, §72.) In support of this contention defendants rely on the case of *Griffin* v. *Chicago & W.I.R.R. Co.*, 101 Ill. App. 284. The *Griffin* case, decided in 1902, involved a nine year old boy who was injured while attempting to jump onto a moving railroad train. An Illinois statute prohibited such activity. The trial court directed the jury to find for the defendant railroad and the Appellate Court affirmed the judgment, thereby holding in effect that the plaintiff's claim was barred as a matter of law by reason of his violation of the statute.

The *Griffin* case does not state the law of Illinois as it presently exists. "Violation of the law by the injured party at the time of the accident is usually evidence of negligence, but there remains a question of fact whether the illegal act is the proximate cause of the injury." *Bonnier* v. *Chicago, B. & Q. R. Co.*, 2 Ill. 2d 606. It is only one of the facts to be considered in determining whether a party is guilty of negligence or contributory negligence. *Reinert* v. *Willing*, 13 Ill. App. 2d 163. Secondly, the question of negligence on plaintiff's part is involved here. Where the party charged with the negligence is within the seven year to fourteen year age group, the presumption exists that he is incapable of negligence; this presumption can be rebutted, however, by the party's alleging the negligence showing that the child had the mental capacity to act negligently. *Hughes* v. *Medendorp*, 294 Ill. App. 424; *Levin* v. *Lauterbach Coal & Ice Co.*, 329 Ill. App. 180. All

the plaintiff in such age group is required to do is show that at and just before the time of the accident he was in the exercise of that degree of care which a child of his age, experience, intelligence and mental capacity would be exercising under like or the same circumstances. *Hughes* v. *Medendorp,* 294 Ill. App. 424. Whether the presumption has been rebutted is a question of fact for the jury, as is the question of whether the violation of the statute constituted the proximate cause of the injury.

A correlated objection raised by the defendants to the trial court's rulings is that the court erred in refusing to direct a verdict for defendants on the grounds that plaintiff was contributorily negligent by jumping on and off the moving railroad train. This objection must fail for the same reasons set out above concerning the violation of the statute. Whether the presumption that plaintiff, a thirteen year old child at the time of the accident, was incapable of acting negligently was rebutted by defendants' evidence as to his mental capacity, experience, age and intelligence was a question of fact for the jury. The trial court properly refused to direct a verdict for defendants on both the matter of contributory negligence and the matter of the violation of the statute.

Defendants further maintain that the trial court was in error in submitting plaintiff's Instruction Number 14 to the jury. The instruction reads as follows:

> "A child is not held to the same standard of conduct as an adult. When I use the words 'ordinary care' with respect to the plaintiff, I mean that degree of care which a reasonably careful child of the age, mental capacity and experience of the plaintiff would use under circumstances similar to those shown by the evidence. The law does not say how such a child should act under those circumstances. That is for you to decide.
>
> "The rule I have just stated also applies when a child is charged with having violated a statute.
>
> "With respect to the charge that the plaintiff violated a statute by going upon a railroad car, you are

> advised that in the case of a child thirteen years old, it is presumed under the law that a child of that age does not have the mental capacity to violate the law, and the party relying upon the claimed violation of the statute by the child has the burden of overcoming that presumption by proving that the child did have such capacity at the time."

Defendants contend that paragraph three of the instruction imposed the burden on the defendants to show that the plaintiff had the mental capacity to violate the statute, whereas this may be the rule for criminal behavior but not for a civil violation; they rely upon *Griffin* v. *Chicago & W.I.R.R. Co.*, 101 Ill. App. 284, in support of this position.

Paragraph three of the instruction correctly states the law of Illinois as it presently exists. A child under fourteen years of age is presumed incapable of violating a penal statute. *Angelo* v. *People,* 96 Ill. 209; *People* v. *Lang,* 402, Ill. 170. This presumption is not conclusive, however, and may be rebutted by a showing that the child did in fact have the mental capacity to violate the law. *People* v. *Lang,* 402 Ill. 170. Defendants set up the claimed violation of the statute as an affirmative defense, thereby taking upon themselves the burden of proving the violation in fact occurred. Without their showing that the plaintiff had the mental capacity to violate the statute, which is one of the elements in the affirmative defense, no violation in fact could have been proven against plaintiff. Defendant's assertion that the presumption of incapacity under fourteen years of age does not apply to "civil violations" can be answered simply by saying that the violation of a statute is merely presumptive evidence of negligence, *Smith* v. *Ohio Oil Co.,* 10 Ill. App. 2d 67, and that where negligence is involved the burden is still on the party alleging the negligence to rebut the presumption that a child under fourteen is incapable of negligence. If the violation is equated to negligence, then it is still incumbent upon the party alleging the violation to rebut the presumption that the child is incapable of negligence. The instruction properly stated the law.

Finally, three forms of verdict were submitted to the jury: (1) for plaintiff and against all the defendants; (2) for plaintiff and against only the Pennsylvania Railroads; and (3) against plaintiff and for all defendants. Defendants-appellants suggest that the trial court was in error in refusing to submit the following fourth form of verdict to the jury:

> "We, the jury, find against the defendant, Chicago, Milwaukee, St. Paul & Pacific Company, a corporation, and assess the plaintiff's damages in the sum of $.....
>
> We, the jury find in favor of the defendants, The Pennsylvania Railroad Company, a corporation, and The Philadelphia, Baltimore & Washington Railroad Company, a corporation, and against the plaintiff as to the said defendants."

It is true, as defendants point out, that this form of verdict does follow IPI 45.03 for use with a single plaintiff and multiple defendants. However, under the state of the law in Illinois relating to negligence by a lessee railroad, the submission of this form of verdict to the jury would clearly have been erroneous. It has long been settled in Illinois that the lessor railroad is vicariously liable to a person injured through the negligence of the lessee railroad, even though there had been no fault on the lessor railroad's part. *Chicago & E. I. R. Co.* v. *Schmitz*, 211 Ill. 446; *Armstrong* v. *C. & W. I. R.R. Co.*, 350 Ill. 426. If the jury found that the Milwaukee Railroad was liable for damages due to its negligence, then it was bound under the law to find that the Pennsylvania Railroads were also liable; under no circumstances could the jury have found the Milwaukee Railroad liable for damages and the Pennsylvania Railroads not liable The three forms of verdict submitted to the jury therefore represented the only possible results to which the jury could come.

The ordinance relied upon by appellee under Count I of the complaint was the City of Chicago special contract ordinance of January 18, 1897, as accepted by the Pennsylvania Rail-

road through its various subsidiaries on February 5, 1897. The ordinance in substance required the accepting railroads to elevate certain portions of their track, to construct underpasses at various cross streets, and to either build retaining walls for the elevations or enclose them with fences in accordance with the City of Chicago fencing ordinance of 1890.

In two cases decided in 1925, the Supreme Court of Illinois held that the passage of the Public Utilities Acts of 1914 and 1921 rendered invalid all municipal enactments and ordinances, both general and special, which related to public utilities. *Village of Atwood* v. *C. I. & W. RR. Co.,* 316 Ill. 425; *Northern Trust Co.* v. *Chicago Rys. Co,* 318 Ill 402. In the *Northern Trust* case, the Court held that a City of Chicago general ordinance requiring headlights on streetcars was rendered invalid by passage of the Acts, and that a person who was fatally injured when struck by a streetcar due to an improperly functioning headlight was precluded from relying upon the ordinance for recovery. The Court stated at page 412: "If it had been deemed wise or necessary, municipal ordinances and police regulations relating to public utilities could have been continued in force until the commission acted, by a saving provision in the act or by an order to that effect from the commission itself. But the act contains no such provision, nor does it appear that the commission made, or was asked to make, any such order."

Shortly after the decision in the above two cases, the Illinois Commerce Commission adopted General Order 121, which is entitled: "In the matter of practices and operations by public utilities relating to the health, comfort or safety of their employees and of the people in cities, villages and incorporated towns in the State of Illinois." This order states, in substance, that the decisions by the Supreme Court in the above two cases indicate that the passage of the Public Utilities Acts of 1914 and 1921 repealed by implication certain police powers conferred upon municipalities by the Cities and Villages Act, and that these police regulations were now inoperative and without authority of law; that these municipal enactments may be in the form of general ordinances or specific provi-

sions in contracts or licenses, franchises, or other forms of regulatory provisions; that difficulty and delay would necessarily attend a comprehensive survey of all such enactments and that the public would be without protection during the period of investigation. The order further stated that it appeared some immediate and comprehensive action should be taken by the Commission continuing the police regulations in the form of city ordinances or regulations. The Commission ordered that all practices and operations of every public utility in compliance with any ordinance or regulation of any city, village or town providing for the protection of the health, comfort or safety of the employees of the utility or of the people of the state, be established, continued and maintained until further order of the Commission.

On July 29, 1937, after some two and one-half years of hearings and investigations, the Commission adopted General Order 138, which is entitled: "In the matter of Rules, Regulations and Requirements relating to the construction, maintenance, marking and protection of crossings of Highways and Railroads in the State of Illinois." The order is captioned: "In the matter of proposed revision and consolidation of rules and regulations and requirements of the Commission relating to the construction, maintenance, marking and protection of crossings of highways and railroads in the State of Illinois, as now set forth in General Orders 4, 33, 36, 40, 50, 55, 106, 119, 120 and 123." The order states in substance that the Commission adopted a resolution whereby proceedings were instituted for the revision and consolidation of its rules, regulations and requirements relating to the construction, maintenance, marking and protection of crossing of highways and railroads, that hearings were held and evidence was taken on various dates between January 16, 1935 and June 9, 1937, which evidence included a copy of the proposed General Order 138, and that the Commission, having considered all of the evidence, is of the opinion that the proposed General Order 138 sets forth reasonable, just and proper rules, regulations and requirements relating to the construction, maintenance, marking and protection of crossings of highways and railroads in the State of Illinois, and the adoption of the said General Order 138 will result in the Commission's requirements on this subject

being assembled in a single document, and being brought up to date and in harmony with present conditions, and will promote the safety and convenience of the public and of the railroads in this State; that all of the General Orders enumerated in the caption of General Order 138, except General Order 4, should be rescinded; and that General Order 121, to the extent that it applies to railroads, should be superseded and rescinded by General Order 138, but otherwise to remain in effect. The Commission ordered that General Order 138 is adopted and declared to be the rules and regulations and requirements of the Commission relating to the construction, maintenance, marking and protection of crossings of highways and railroads in the State of Illinois, that General Orders 33, 36, 40, 50, 55, 106, 119, 120 and 123 are rescinded, and that General Order 121, to the extent that it applies to railroads is superseded and rescinded by General Order 138, but otherwise to remain in effect.

Appellants take the position that General Order 138 completely nullified General Order 121 as it applied to railroads, which in turn removed any duty on their part to fence the area between the Van Buren Street underpass wall and the existing fence which ran parallel to the elevation; that appellee is therefore precluded from relying on the special ordinance in question as a ground for liability; and that the trial court was in error in allowing the ordinance into evidence and in allowing it to serve as the basis of an instruction to the jury. Appellee contends that, although the ordinance may have been rendered invalid by the passage of the Public Utilities Acts, the requirements of the ordinance were continued in force and effect by General Order 121; that General Order 138, while it may have rescinded the grade crossing requirements reinstated by General Order 121, had no effect on the fencing requirements reinstated by that order; and that the statutory duty still remained with appellants to fence the area in question.

We are of the opinion that the fencing requirements of the City of Chicago special ordinance of January 18, 1897, were in force and effect at the time of appellee's injury;

that appellants had the duty to fence the area in question; and that the trial court properly admitted the ordinance into evidence and allowed it to serve as the basis of an instruction to the jury.

Sec. 67 of the Public Utilities Act (Ill. Rev. Stat. 1963, Chap. 111⅔, § 71) which was in effect at the time of the adoption of General Order 138, requires that the Illinois Commerce Commission give notice of the subject matter to all interested parties and afford them an opportunity to be heard before it can alter or rescind any prior order. Furthermore, the Commission's authority to act under section 67 is controlled by section 65 of the Act (presently section 69) in that any such rescinding or modifying order must be based upon findings of fact which in turn must be based upon the evidence presented. *Farmers' Elevator Co. of Yorkville, et al.* v. *Chicago, R. I. & P. Ry. Co.*, 266 Ill. 567; *Central Northwest Business Men's Ass'n, et al.* v. *Commerce Commission, et al.*, 337 Ill. 149. The Commission is without power to change existing regulations arbitrarily or through caprice. If the statutory requirements are not followed as to notice or hearing or presentation of evidence and finding of fact based thereon, the Commission loses its jurisdiction to act and any order entered by the Commission under such circumstances is necessarily void. *Chicago District Pipeline Co.* v. *Commerce Commission*, 361 Ill. 296; *Dietman* v. *Hunter et al.*, 5 Ill. 2d 486; 2 Am. Jur. 2d Administrative Law §§ 398, 400.

Examination of General Order 138 shows that the notice of the hearings and the hearings themselves, upon which the order was based, were limited to the "general revision and consolidation of rules and regulations and requirements of the Commission relating to the construction, maintenance, marking and protection of crossings of highways and railroads in the State of Illinois, as now set forth in General Orders 4, 33, 36, 40, 50, 55, 106, 119, 120 and 123." No reference was made to General Order 121 at this point. It is also significant to note that all of the aforementioned orders, except General Order 121, dealt specifically with some phase of highway and rail-

road crossing marking, maintenance, protection and construction. The entire body of General Order 138, including the forms and drawings relating thereto, shows that the inquiry was precisely limited to the subject of marking, maintenance, construction and protection of crossings of railroads and highways, and indicates that evidence was taken on that subject alone. The findings are limited to the subject of marking, maintenance, protection and construction of crossings of highways and railroads and in no way indicate that the subject matter of fencing is involved. Finally, nowhere in the entire document is there a word pertaining to the subject matter of fencing.

Appellants suggest that the finding and order of the Commission, that "General Order 121, to the extent that it applies to railroads, should be deemed to be superseded and rescinded by General Order 138, but otherwise to remain in effect," were intended simply to remove any and all railroad ordinance requirements from the purview of General Order 121 to the jurisdiction of General Order 138. But the wording of the finding and the order in question is susceptible to two different interpretations, namely, that the Commission found and ordered that all railroad ordinance requirements covered by General Order 121, including fencing, should be rescinded and superseded by General Order 138, or, that the Commission found and ordered that General Order 138 rescinded and superseded General Order 121 as it applied to railroads but only insofar as General Order 138 was capable of so doing. Where such ambiguity exists in an administrative order the rule of construction applicable to statutes and to judgments and decrees of court should be applied. See 50 Am. Jur. Statutes §§ 225, 226; 2 Am. Jur. 2d Administrative Law § 307; *Aloe* v. *Lowe, et al.*, 298 Ill. 404, 408.

The Commission knew the extent of the notice given, of the hearings and investigations, and of the findings of fact made for the purpose of effecting General Order 138. Its stated purpose in adopting General Order 138 was to unify into a single document and to bring up to

date its requirements on the subject of construction, maintenance, marking and protection of crossings of highways and railroads. Not one shred of evidence exists that the Commission was concerned with matters other than crossings of highways and railroads. Another of its stated purposes in the adoption of General Order 138 was the protection and convenience of the public and the railroads operating in the State of Illinois; the Commission's purpose in adopting General Order 121 was the reinstatement of the protection afforded by municipal enactments affected by the passage of the Public Utilities Acts during the period while the Commission was engaged in a comprehensive survey of all such enactments. Appellant's construction of that part of General Order 138 here in question, however, would frustrate the Commission's intention to afford protection to the public, by eliminating these protections in all phases of railroad activity other than the construction, maintenance, marking and protection of crossings. To attribute to the Commission the intention of rescinding any and all railroad ordinance requirements covered by General Order 121 is therefore unreasonable. This is especially true in view of the fact that such a construction of the order would render the entire order void for lack of proper notice, hearings, and findings of fact as to all railroad ordinance requirements covered by General Order 121 other than those relating to the maintenance, marking, protection and construction of crossings. It is evident that the effect of General Order 138 upon General Order 121 was intended by the Commission to be limited solely to the scope of General Order 138, namely, the recission of all railroad ordinance requirements covered by General Order 121 relating to marking, maintenance, construction and protection of crossings and in no way was intended to affect the fencing requirements.

The question of collateral attack on a Commerce Commission order raised by appellants is moot; under the construction given to General Order 138, a consideration of the validity of the order is unnecessary. Secondly,

applying the rule applicable to judgments and decrees of court, the construction of an order does not involve an attack upon its validity. See 30A Am. Jur. Judgments § 69; *St. Louis, K. C. & C. RR. Co.* v. *Wabash RR. Co. and City of St. Louis*, 217 U.S. 247; *Ballew* v. *Denny*, 296 Ky. 368.

Similarly, the review provisions of the Public Utilities Act have no application here. This court is not attempting to put itself into the place of the Commerce Commission; it is not attempting to try a second time a question already presented to the Commission; nor is it attempting to substitute its own judgment for that of the Commission. Construction of ambiguous wording in an administrative order and a reconsideration of the merits of the order are two entirely different matters.

We find no conflict between the views presented here and those presented by the United States Court of Appeals for the Seventh Circuit in the recent case of *Blaauw* v. *Grand Trunk Western Railroad Company*, 33 F2d 540. John Blaauw, a five year old boy, was injured by defendant's railroad train. He and two companions were on defendant's right of way, having gained access thereto by an unfenced culvert which was frequently used by the neighborhood children to get to a small pond of water on the right of way. Blaauw crawled between two railroad cars and after he got to the other side the train began to move. He took hold of a grab-bar on the car, ran with the train a short distance, tripped and fell under the wheels. Plaintiff maintained at trial that (1) defendant had violated its common law duty to fence the area and to take necessary precautions under the circumstances in accordance with the Kahn rule and (2) defendant had violated the duty to fence imposed by an 1890 Chicago ordinance as continued in force and effect by General Order 121 of the Illinois Commerce Commission; and that this was the proximate cause of his injury. The trial court directed a verdict for defendant on the ordinance count, relying on General Order 138 as the basis therefor, and the jury found for the defendant on the common law

count. Plaintiff appealed, alleging (1) that the verdict was against the manifest weight of the evidence and (2) that the trial court erred in directing a verdict for the defendant on the ordinance count for the reason that General Order 138 was ineffective due to procedural errors on the Commission's part in adopting the order. The Court of Appeals affirmed, holding that the questions of negligence, proximate cause and damages were jury questions and that the reviewing court will not interfere unless it is clearly evident that the verdict is against the manifest weight of the evidence; that the jury could reasonably have found that the defendant's conduct was not the proximate cause of the injury; and that plaintiff had relied on the procedural errors involved in the adoption of General Order 138, thereby challenging a voidable order only incapable of collateral attack. In the case at bar, however, appellants do not raise the question of sufficiency of evidence, but rely solely on other questions of law for reversal. Secondly, the plaintiff in this case requested a construction of General Order 138 as the preferred alternative to questioning its validity, which was not requested in the *Blaauw* case.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

FRIEND, *J.*, and BRYANT, *J.*, concur.

APPENDIX B

Excerpts from the First Petition for Rehearing in the Supreme Court of Illinois Filed December 3, 1965.

THE OPINION OF THE COURT JUDICIALLY DEPRIVES DEFENDANTS OF THEIR RIGHT TO A FAIR TRIAL BEFORE AN IMPARTIAL JURY.

By instructing the jury that the ordinances were valid when, in fact, they were void, the trial court so prejudiced the jury that it was impossible for them to return a verdict free of this prejudicial error. A trial based on void and invalid ordinances, which the jury was instructed were valid and binding, cannot constitute a trial before a fair and impartial jury to which defendants are entitled. Ill. Const. Art. 2 §5; U. S. Const. amend. VII, XIV.

The constitutional right of "trial by jury" is the right to have the facts in controversy determined by 12 impartial jurors. Ill. Const. Art. 2 §5. *People* v. *Lobb*, 17 Ill. 2d 287, 298 (1959). Courts jealously guard the right of a person to a trial by jury. *Stephens* v. *Kasten*, 383 Ill. 127, 133 (1943). The right of trial by jury is a fundamental right in the American democratic judicial system. *Ney* v. *Yellow Cab Co.*, 2 Ill. 2d 74, 84 (1954). Reversing a judgment on conflicting evidence without remanding the cause deprives a party of his constitutional right to a trial by jury. *Damato* v. *Consumers Co.*, 327 Ill. 249, 250 (1927); *Segal* v. *Chicago City Ry.*, 325 Ill. 43, 45-46 (1927). A determination by the Appellate Court of the ultimate facts in a jury case, particularly from evidence not even submitted to a jury, or evidence improperly submitted and made the basis of a jury instruction, would constitute an infringement of the jury's function. *Cf.*, *Gundick* v. *Emerson-Comstock Co.*, 21 Ill. 2d 117, 127-128 (1960).

As stated by the Supreme Court of the United States:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order

to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences." *Tennant* v. *Peoria & P. U. Ry.*, 321 U. S. 29, 35, *rehearing denied* 321 U. S. 802 (1944).

Defendants are entitled to a trial free from prejudicial error. They are entitled to a jury determination of their liability and, if they are found liable, they are entitled to a jury determination of the amount of the damages to be assessed against them without the grossly prejudicial instruction that they are bound by the ordinances to fence their tracks. The opinion of the court unequivocally holds that it was error to admit the ordinances and to instruct the jury that they were valid and binding, when, in fact, they were void, but then goes on to pardon the error and asserts an alternative ground to justify affirming the judgment as to liability based upon the "vicarious liability" theory of *Armstrong* v. *Chicago and W. I. R. R.*, 350 Ill. 426 (1932). Thus the court establishes itself as the fact finding body and, as a matter of law, determines that the jury did not consider and was in no way influenced by the erroneous instruction as to the status of the applicable law and the enormous emphasis placed upon the ordinances by the attorney for the plaintiff. This can only be characterized as a judicial denial of defendants right to a fair trial before an impartial jury. As stated in *Ney* v. *Yellow Cab Co.*, *supra*, 2 Ill. 2d 74, at 84:

> "The right of trial by jury is recognized in the Magna Carta, our Declaration of Independence and both our State and Federal Constitutions. It is a fundamental right in our democratic judicial system. Questions which are composed of such qualities sufficient to cause reasonable men to arrive at different results should never be determined as matters of law. The debatable quality of issues such as negligence and proximate cause, the fact that fair-minded men might reach different conclusions, emphasize

the appropriateness and necessity of leaving such questions to a fact-finding body. The jury is the tribunal under our legal system to decide that type of issue. To withdraw such questions from the jury is to usurp its function. *Bailey* v. *Central Vermont Railway Co.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. ed. 1444."

Certainly the court cannot properly hold that the second determination of the jury, the issue of the *amount* of defendants damages would be exactly the same. The court cannot conclude, as a matter of law, that the fact the jury was instructed that the fencing ordinances were valid played no part in their determinations as to the *amount* of damages to be assessed against defendants. The sole explanation for the obviously excessive verdict is the great emphasis placed upon the failure of defendants to comply with the fencing ordinances by the attorney for the plaintiff in his closing arguments. That there might exist another basis of liability cannot remove the prejudice to defendants with respect to the issue of damages when the attorney for the plaintiff was permitted to argue to the jury that they were acting in willful violation of law (Abst. 387, 392-303, 428-430).

The opinion of the court cannot judicially purge the prejudice that was instilled in the minds of the jurors by the instruction that the ordinances were valid (Abst. 44-45). A reading of the record lays bare the overwhelming emphasis placed on defendants violation of the fencing ordinances. The first mention of liability in the closing argument of the attorney for the plaintiff is that of defendants failure to comply with the fencing ordinances (Abst. 387). He read the 1890 ordinance to the jury (Abst. 392-393). He read the general specifications of the 1890 ordinance to the jury (Abst. 393-394). He read the ordinance of 1896 to the jury (Abst. 397-398). In his final closing argument he repeatedly, relentlessly, and unceasingly hammered at the jury that the defendants were bound, *as a matter of law,* to fence their tracks and they did not do so:

"I am sure counsel defending those railroads does not seriously suggest to this jury his companies or that the companies he works for complied with the fencing and track elevation ordinances." (Abst. 428).

"Can counsel say to you here, can he look you in the eye and say to you they complied with that law? They know they didn't."

"Ladies and gentlemen, it could not have been proven more conclusively if you heard cases for a thousand years that the law was passed and they violated that law." (Abst. 429).

"All of the time I spent here with you trying to prove these ordinances, their knowledge of them and their acceptance of them and counsel for the Pennsylvania and Philadelphia Railroads hasn't a word to say in extenuation or explanation of why this railroad didn't obey the law." (Abst. 430).

Can this court hold, as a matter of law, that these arguments had no effect upon the jury in their deliberations as to the issues of liability or as to the *amount* of damages to be assessed against defendants? The opinion of the court as it is presently written constitutes an open invitation to plaintiff attorneys to obtain a verdict by any means, for so long as they can justify one theory of recovery, the court will uphold the judgment.

In the only other reported case involving the fencing ordinances, the trial court ruled that they were void and withheld them from the jury. A verdict of not guilty was returned, The verdict and the trial court's holding that the ordinances were void was affirmed on appeal. *Blaauw* v. *Grand Trunk Western R. R.*, 333 F. 2d 540 (7th Cir. 1964). When the opinion of the Appellate Court in this case holding the ordinances valid was brought to the attention of the Supreme Court of the United States, that Court vacated the judgment in the *Blaauw* case and remanded it in view of the opinion of the Illinois Appellate Court. *Blaauw* v. *Grand Trunk Western R. R.* 380 U.S. 127 (1965). In justice and fairness, the Supreme Court of Illinois should do no less.

Excerpts from the Answer to the Second Petition for Rehearing in the Supreme Court of Illinois Filed June 2, 1966.

Defendants Are Entitled to Their Constitutional Right to A Fair Trial Before an Impartial Jury

The court has held that the fencing ordinances are void and that it was prejudicial to defendants to admit them into evidence. The plaintiff does not dispute this. He asserts, however, that since defendants are jointly liable for negligence in the operation of the Milwaukee train, it need only be shown that the *Milwaukee* was not prejudiced by the admission of the fencing ordinances. That *defendants* were deprived of a fair trial would not justify reversal.

Although the petition for rehearing contains no authorities in support of this contention, it would appear that it is based on the case of *Armstrong* v. *Chicago & W.I.R.R.*, 350 Ill. 426.

As defendants have heretofore shown, the *Armstrong* case has never been applied to a trespasser who was unlawfully jumping on and off of moving railroad trains.

Assuming *arguendo*, however, that the *Armstrong* case does apply, there is nothing in that opinion which constitutes authority for the plaintiff's proposition that defendants are not entitled to fair trial with the fencing ordinances excluded. The *Armstrong* case merely holds that, "where an injury results from the negligent or unlawful operation of a railroad, whether by the owner or by another whom the owner authorizes or permits to use its tracks, both railroads are liable to respond in damages." *Armstrong, supra*, at 431. This is not an unusual or uncommon principal of law. It certainly cannot be read to say that the operating or using railroad is entitled to a fair trial but the owning railroad is not. Moreover, such a contention is in direct conflict with fundamental guarantees of both state and federal Constitutions. Ill. Const. Art. 2 § 5; U. S. Const. amend. VII, XIV.

Defendants *are* entitled to a trial free from prejudicial error. They *are* entitled to their constitutional right to receive a fair trial before an impartial jury. See Petition for Rehearing, pp. 2-7. There is no authority in the *Armstrong* case or in any other case that could possibly justify denying defendants this fundamental constitutional right.

In this connection, it is interesting to note the deep apprehension with which the plaintiff views a retrial of this case with the fencing ordinances excluded. If the plaintiff is so certain that the admission of the evidence was not prejudicial, why is he concerned about a new trial? The answer is obvious. The basis of the jury's verdict *was* the fencing ordinances. The only way in which the plaintiff's dangerous and unlawful conduct could be overcome before the jury was by the introduction of the fencing ordinances. Certainly, jumping on and off of moving railroad trains is not a practice which is viewed with favor or condonation in this society. This is particularly true when a person persist in such activity after being warned against it and despite his own knowledge of the danger. It was the plaintiff who set the tenor of the trial. It was he who framed the pleadings. And it was he who successfully kept the ordinances the principal issue in the case. The plaintiff's closing argument demonstrates beyond dispute that it was the ordinances upon which the plaintiff relied to obtain his verdict:

> "I am sure counsel defending those railroads does not seriously suggest to this jury his companies or that the companies he works for complied with the fencing and track elevation ordinances."
>
> "Can counsel say to you here, can he look you in the eye and say to you they complied with that law? They know they didn't."
>
> "Ladies and gentlemen, it could not have been proven more conclusively if you heard cases for a thousand years that the law was passed and they violated that law."

"All of the time I spent here with you trying to prove these ordinances, their knowledge of them and their acceptance of them and counsel for the Pennsylvania and Philadelphia Railroads hasn't a word to say in extenuation or explanation of why his railroad didn't obey the law."

The plaintiff is well aware that the only way in which he was able to overcome his own dangerous conduct before the jury was by the fencing ordinances. The only way in which he could avoid the impact of his own reckless behavior was by relentlessly hammering at the jury that *defendants* were acting in wilful violation of law. It is for this reason that he fears a new trial with the fencing ordinances excluded. What the plaintiff most desperately wants to avoid is a *fair trial* before a jury which has not been prejudiced by erroneous instructions and argument as to the law of this state.

Excerpts from the Third Petition for Rehearing in the Supreme Court of Illinois Filed July 1, 1966

FAIR TRIAL

This court has conceded that defendants did not receive a fair trial:

"It is true, and plaintiff recognizes, that liability cannot be based on breach of the ordinances which we find to be void. The point that plaintiff chooses to ignore, however, is that the introduction of the ordinances, the strong emphasis placed on their breach and the instruction that they were valid was highly prejudicial to the Pennsylvania.

"In considering whether the jury would have reached the same result if the highly prejudicial evidence had not been admitted we must deal with practicalities. We feel that fairness requires a new trial. The judgments are reversed and the cause remanded for a new trial."

It is difficult to believe that after such a statement the court could write another opinion not even referring to the question of a fair trial.

A fair trial is guaranteed to all under both the State and Federal Constitutions. Ill. Const. Art. 2, §5, §§2, 19; U. S. Const. amend. VII, XIV. Moreover, it is a right which the Supreme Court of Illinois is sworn to uphold. Ill. Rev. Stat. 1961, ch. 37 §11. There can be no justification or excuse for denying defendants a fair trial, and this court has given none. See Petition for Rehearing pp. 2-7.

Certainly the court cannot properly hold that the second determination of the jury, the issue of the amount of plaintiff's damages would be exactly the same. The court cannot conclude, as a matter of law, that the instruction to the jury that the fencing ordinances were valid played no part in the determination of the damages to be assessed. The amount of the verdict in this case was $275,000.00. The amount of the verdict in *Dickeson* v. *Baltimore & Ohio, C.T.R.R., et al.*, Ill. App # 49363, certified to this court by the plaintiff, was $116,480.00. The difference between the two is more than $150,000.00. In the *Dickeson* case the trial court properly withheld from the jury all reference to the fencing ordinances. The only way in which the difference in the amount of the judgments can be explained is by the introduction of the fencing ordinances and the plaintiff's argument that, *"it could not have been proven more conclusively if you heard cases for a thousand years that the law was passed and they violated that law."*

The plaintiff's characterization of defendants as quasi-criminals acting in direct and wilful violation of law was a powerful weapon. It was used with obvious success to greatly increase the amount of the verdict:

> "I am sure counsel defending those railroads does not seriously suggest to this jury his companies or that the companies he works for complied with the fencing and track elevation ordinances." (Abst. 428).

"Can counsel say to you here, can he look you in the eye and say to you they complied with that law? They know they didn't."

"Ladies and gentlemen, it could not have been proven more conclusively if you heard cases for a thousand years that the law was passed and they violated that law." (Abst. 429).

"All of the time I spent here with you trying to prove these ordinances, their knowledge of them and their acceptance of them and counsel for the Pennsylvania and Philadelphia Railroads hasn't a word to say in extenuation or explanation of why this railroad didn't obey the law." (Abst. 430).

It is utterly impossible to exclude the impact of this argument from the verdict of the jury. The guarantees of a fair trial require that the judgment be reversed.

Excerpts from the Suggestions of Defendants-Petitioners in Response to the Motion of Plaintiff-Respondent to Strike the Third Petition for Rehearing Filed July 12, 1966.

SUGGESTIONS

The plaintiff correctly states that the court has filed three separate opinions in this case. It is also true that the first and third opinions appear to be the same. Each opinion, however, was separately filed and each, therefore, is a separate opinion from which a petition for rehearing may properly be filed. Only one petition for rehearing has been filed from the third opinion.

Furthermore, the effect and significance of the third opinion is entirely different from that of the first opinion because of the statement by the court in its second opinion that defendants did not receive a fair trial:

"It is true, and plaintiff recognizes, that liability cannot be based on breach of the ordinances which we find to be void. The point that plaintiff chooses

to ignore, however, is that the introduction of the ordinances, the strong emphasis placed on their breach and the instruction that they were valid was highly prejudicial to the Pennsylvania.

"In considering whether the jury would have reached the same result if the highly prejudicial evidence had not been admitted we must deal with practicalities. We feel that fairness requires a new trial. The judgments are reversed and the cause remanded for a new trial."

The intervening opinion, therefore, most significantly changes the import of the third opinion. It raises serious constitutional questions concerning defendants' right to a fair trial and to due process of law. Ill. Const. Art. 2, §5, §§2, 19; U. S. Const. amend. VII, XIV.

APPENDIX C

United States Constitution, Amendment XIV, Section I

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

APPENDIX D

Plaintiff's Jury Instruction No. 3, *Given*

There was in force in the City of Chicago at the time of the occurrence in question a certain ordinance passed on January 18, 1897, which provided that where certain designated railroads, including the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, a corporation, elevated the plane of their roadbeds and tracks in accordance with said ordinance:

> "The embankments on which said elevated track shall be carried between the intersecting streets, boulevards or avenues shall be composed of sand, gravel, loam, clay, broken stone, or whatever else may compose the surplus material excavated from the subways and from the foundation pits and trenches along the line of said work, and their side slopes shall be defined by the natural angle of repose of the material out of which the embankments are constructed; or such embankments shall be carried between retaining walls of stone or brick masonry; but when such retaining walls are not used, the right of way of said railway companies shall be enclosed with fences, or otherwise, in compliance with the present ordinance of the city relating to the fencing of railway tracks."

If you decide that a party or parties violated the ordinance of January 18, 1897, on the occasion in question, then you may consider that fact together with all the other facts and circumstances in evidence in determining whether or not the said party or parties were negligent before and at the time of the occurrence as claimed in Count I of the plaintiff's complaint.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 879

THE PENNSYLVANIA RAILROAD COMPANY and THE PHILADELPHIA, BALTIMORE & WASHINGTON RAILROAD COMPANY,

Petitioners,

vs.

AMERICAN NATIONAL BANK AND TRUST COMPANY, Guardian of the Estate of HENRY LEE EDWARDS, a minor,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

The opinion of the Supreme Court of Illinois is fully and correctly set forth in Petition, Appendix A at p. 14a, and is reported at 35 Ill.2d 145; 219 N.E.2d 529

(1966). The Illinois Supreme Court filed two earlier opinions which are unreported. The first opinion is identical with the final opinion, and is fully and correctly set forth in Petition, Appendix A, pp. 1a-7a. The second opinion is unreported and is fully and correctly set forth in Petition, Appendix A, pp. 8a-13a.

The opinion of the Appellate Court of Illinois is fully and correctly set forth in Petition, Appendix A, pp. 21a-45a, and is reported at 52 Ill.App.2d 406, 202 N.E.2d 79 (1st Dist. 1964).

JURISDICTION.

There are no valid constitutional questions presented by the Petition, and Petitioners therefore improperly seek to invoke the jurisdiction of this Court under 28 U.S.C. §1257 (3). But even if constitutional questions were presented, which Respondent denies, the issues as to the deprivation of any of the Petitioners' constitutional rights were not raised at the first opportunity in the state courts of Illinois, and therefore are not preserved for review by this Court. See argument, infra, pp. 10-11.

QUESTIONS PRESENTED.

1. Whether Petitioners can invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257 (3), when the alleged constitutional questions stated in the Petition for the Writ of Certiorari were not raised until after the Illinois Supreme Court had rendered its opinion more than four years after the trial, in favor of Respondent and against Petitioners.

2. Whether the constitutional rights of the Petitioners to a jury trial or due process were violated because the Illinois Supreme Court affirmed a judgment against Petitioners on the basis of negligence of a co-defendant railroad operating its train on Petitioners' tracks, for which negligence Petitioners were liable under state law, where the only error complained of, the introduction of fencing ordinances and references by counsel thereto, could in no way have affected the jury verdict against the co-defendant, or the jury verdict against the Petitioners on the ground that Petitioners were liable for the negligence of their co-defendant.

STATEMENT OF THE CASE.

This was an action to recover damages for personal injuries suffered by the 13 year old minor plaintiff when he was run over by a Chicago, Milwaukee, St. Paul & Pacific Railroad Company train, which was operating under a leasing agreement on the tracks and right of way owned and controlled by the Pennsylvania Railroad Company, and the Philadelphia, Baltimore, and Washington Railroad Company. The plaintiff suffered a traumatic amputation of both his legs. Suit was brought against three railroads: The Pennsylvania Railroad Company, a corporation; The Philadelphia, Baltimore and Washington Railroad Company, a corporation (hereinafter jointly referred to as the "Pennsylvania"); and The Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation (hereinafter referred to as the "Milwaukee"). The two railroads identified as the "Pennsylvania" owned and controlled the tracks and right of way. The "Milwaukee," under a leasing agreement, was one of several railroads which operated on the Pennsylvania tracks. (R. 3, pp. 104-105)

The jury rendered a general verdict for the plaintiff against all three defendants for $275,000.00, and the court entered judgment upon the verdict. After all Post-trial motions had been overruled, the Milwaukee paid the plaintiff the sum of $75,000.00 for a covenant not to enforce the judgment against it, and the Pennsylvania appealed.

The Only Ground Of Recovery Against The Milwaukee Submitted To The Jury.

The claim against the Milwaukee was submitted to the jury on the theory that the Milwaukee was negligent in the operation of its train, and that its negligence was a proximate contributing cause of the plaintiff's injuries which occurred while the plaintiff was in the exercise of ordinary care. The liability of the Milwaukee was based solely on its common law duty to exercise ordinary care in the operation of its train. The liability of the Milwaukee was not based on any duty under any ordinance or under the common law to fence or guard the right of way of Petitioners, the Pennsylvania, the owning railroads.

The jury was instructed that the Milwaukee had no duty to fence the right of way, and that the only charge of negligence against the Milwaukee was that it negligently operated its train. (R. 3, p. 45) Plaintiff's counsel told the jury that the liability of the Milwaukee was different from that of the Pennsylvania; that the obligation of the Milwaukee was *limited* to the manner in which the train was operated, and what warnings management should have given operating personnel about the running of trains at the place in question. (R. 3, pp. 387-388) The Illinois Supreme Court held, 35 Ill.2d at 152:

> "A fair reading of the record convinces us that the jury could not have been prejudiced by the stress placed on the ordinances in rendering judgment against the Milwaukee."

The jury found in favor of the plaintiff and against the Milwaukee. The Illinois Supreme Court noted, 35 Ill.2d at 152:

"There is sufficient evidence in the record from which the jury could find that the train crew on the Milwaukee was negligent and the Pennsylvania does not question this point."

The Grounds Of Recovery Alleged Against The Pennsylvania.

In the trial of the cause the plaintiff relied upon three separate and distinct bases of liability on the part of the Pennsylvania:

1. The Pennsylvania, as owner of the tracks and right of way on which the Milwaukee was operating its train at the time of the occurrence, was liable for the negligence of their lessee, the Milwaukee.

2. The Pennsylvania was liable because of their common law negligence in failing to take reasonable precautions to protect children from being injured on their property, after they knew, or in the exercise of ordinary care should have known, that for at least 25 years children ranging from ages 6 to 16 years had been going up on the railroad tracks to get to and from a playground immediately adjacent to the right of way, and playing on the elevation, and getting on and off standing cars or riding on slow moving trains in the area; that the children because of their immaturity were unable to appreciate the great danger to which they were exposed; and the Pennsylvania, because of the extreme danger to the children under the foregoing circumstances, should have foreseen that the children might have been injured, and should have taken reasonable precautions to protect the youngsters from injury on the premises of the railroads.

3. The Pennsylvania was liable for its failure to fulfill its contractual agreement to fence its right of way. The contract was entered into by the Pennsylvania's predecessor pursuant to a special ordinance of the City of Chicago.

The foregoing are the three grounds for recovery from Petitioners upon which the Respondent relied in the trial court.

The Holding of the Illinois Supreme Court.

The Illinois Supreme Court held that the liability of the Pennsylvania was conclusively established on the first basis of liability advanced by the plaintiff, that the Pennsylvania had not questioned the fault of the Milwaukee, as shown by the evidence; that since the Milwaukee was negligent in the operation of its train, the Pennsylvania, as owner of the tracks, was liable for the negligence of the Milwaukee. The court stated, 35 Ill.2d at 151-152:

> "It is well established that where an injury results from the negligent or unlawful operation of a railroad, whether by the owner or by another company authorized or permitted to use the tracks, both railroad companies are jointly and severally liable for damages to the injured. (*Armstrong* v. *Chicago and Western Indiana Railroad Co.*, 350 Ill. 426; *Chicago and Eastern Railroad Co.* v. *Schmitz*, 211 Ill. 446; *Chicago and Grand Trunk Railway Co.* v. *Hart*, 209 Ill. 414.) It is not disputed that the Milwaukee was the lessee of the Pennsylvania."

Because the Pennsylvania, under long established Illinois law, was liable for the negligence of the Milwaukee, the Illinois Supreme Court deemed it unnecessary to discuss the negligence of the Pennsylvania based upon their

common law duty to protect children, stating, 35 Ill.2d at 153-154:

> "Since the liability of the Milwaukee was not based on the attractive nuisance doctrine and since the Pennsylvania is vicariously liable for the negligence of the Milwaukee, we see no reason to consider the applicability of the attractive nuisance doctrine as applied to the Pennsylvania."

Similarly, since the negligence of the Milwaukee, when the case was submitted to the jury, was not based on any alleged failure to comply with a common law duty to fence or any ordinance pertaining to fencing, and since the Pennsylvania is vicariously liable for the negligence of the Milwaukee, it was not necessary that the court, in upholding the Respondent's recovery against the Pennsylvania, consider the binding effect of the contractual agreement of the Pennsylvania to fence, pursuant to the track elevation ordinances of the City of Chicago. However, the court did pass on that question also. As noted by the Illinois Supreme Court in its opinion, 35 Ill.2d at 148, the Pennsylvania devoted over one-half of its brief to the question of the fencing ordinances, and an *amici curiae* brief was filed by nine major railroad companies urging the Illinois Supreme Court to hold the Chicago fencing ordinances invalid because of the passage of the Illinois Public Utilities Act.

Respondent contended that a holding that the *passage* of the Illinois Public Utilities Act creating a Commerce Commission relieved the railroads of their contractual obligations to the inhabitants of the City of Chicago to fence their rights of way would be violative of the contract clause of the federal and state Constitutions; U. S. Const. art. I, §10; Ill. Const. art. II, §14. Although, as

shown, a decision as to the validity of the fencing ordinances was not necessary to the determination of the liability of the Pennsylvania, the court did pass on that issue, held the ordinances invalid, and that the Pennsylvania was not obligated to fence by virtue of the requirements of any ordinance.

The court noted however that the introduction in evidence of these fencing ordinances in no way affected the liability of the Milwaukee Railroad, or the liability of the Pennsylvania for the negligence of the Milwaukee. The court concluded that the admission in evidence and references to the fencing ordinances were therefore harmless error, and the judgment for the Respondent against the Petitioners was accordingly affirmed.

ARGUMENT.

1. PETITIONERS DID NOT RAISE THEIR ALLEGED CONSTITUTIONAL QUESTION AT THE FIRST OPPORTUNITY IN THE STATE COURTS, AND THAT QUESTION HAS THEREFORE NOT BEEN PRESERVED FOR REVIEW BY THIS COURT.

The Petitioners did not raise the alleged constitutional question as to the deprivation of the right to a fair jury trial at the first opportunity. Petitioners admit that they did not raise the constitutional question until their Petition for Rehearing was filed in the Illinois Supreme Court (Pet'n., p. 2), four years after the judgment had been rendered in favor of the plaintiff.

Prior to the first opinion entered by the Illinois Supreme Court, the Petitioners never argued that the introduction of the ordinances resulted in a denial of a constitutional right to a fair jury trial, despite the fact that the Respondent had repeatedly and consistently argued, both before the Appellate and Supreme Courts, that even if the court were to hold that a recovery could not be sustained against the Pennsylvania on the basis of their alleged violation of the fencing ordinances, the Pennsylvania were nevertheless liable, independently of any other ground, because of the negligence of the Milwaukee Railroad while operating its train on the Pennsylvania tracks.

The trial court's judgment was entered in 1962. Not until 1966, after both the Appellate and Supreme Courts of Illinois had held the plaintiff was entitled to recover under Illinois law, did the Petitioners first attempt to

open an avenue of review to the United States Supreme Court by contending that there had been violation of a federally protected constitutional right of Petitioners to a fair jury trial.

2. THE CLAIM THAT CONSTITUTIONAL RIGHTS WERE VIOLATED IS WITHOUT MERIT.

The Pennsylvania were not deprived of due process of law or of the right to a trial by jury because of the introduction of evidence as to fencing and track elevation ordinances or any reference thereto during the trial.

The Milwaukee was one of a number of railroads operating its trains on the tracks of the Pennsylvania under a leasing agreement. The evidence proved that the Milwaukee negligently operated one of its trains, and thereby proximately caused the injuries suffered by the plaintiff. The trial judge, the Appellate Court of Illinois, and the Illinois Supreme Court all found that there was sufficient evidence in the record to uphold the finding of the jury that the Milwaukee train was negligently operated on the Pennsylvania tracks. Negligent operation of its train was the only charge against the Milwaukee which was submitted to the jury.

The Pennsylvania *has never questioned* the fact that there was sufficient evidence in the record from which the jury could properly find that the train crew on the Milwaukee was negligent.[1]

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[1] The first time in the long history of this case in which the Petitioners make any reference to the evidence against the Milwaukee is in a somewhat ambiguous reference in a footnote in their Petition for Certiorari, p. 8.

When the liability of the Milwaukee, a lessee or user of the Pennsylvania tracks was established, the Pennsylvania as the owner-lessor became vicariously liable. The Pennsylvania, as the owning-lessor railroads, were legally responsible for the acts of the Milwaukee, the lessee or user, in the operation of the Milwaukee train on the Pennsylvania tracks. *Chicago & E. I. RR.* v. *Schmitz,* 211 Ill. 446, 71 N.E. 1050 (1904); *Armstrong* v. *C. & W. I. RR.,* 350 Ill. 426, 183 N.E. 478 (1932); *Chicago and Erie RR.* v. *Meech,* 163 Ill. 305, 45 N.E. 290 (1896); *Pennsylvania Co.* v. *Ellett,* 132 Ill. 654, 24 N.E. 559 (1890).

In *Pennsylvania Co.,* supra, the court stated, 132 Ill. at 659, that under an "unbroken line of decisions":

> "[W]here injury results from the negligent or unlawful operation of the railroad, whether by the corporation to which the franchise is granted, or by another corporation, or by individuals whom the owner authorizes or permits to use its tracks, the company owning the railway and franchise will be liable."

And, at p. 660:

> "It follows, therefore, that no other negligence than that of the company or corporation permitted or authorized by the owner company to use its railway, need be alleged or proved to fix the liability of the owner."

The evidence and verdict establishing the liability of the Milwaukee established also the liability of the Pennsylvania.

The Illinois Supreme Court in the instant case further held that the introduction of the fencing ordinances were not prejudicial on the issue of whether the Milwaukee negligently operated its train, stating, 35 Ill. 2d at 152:

> "The court instructed the jury that the Milwaukee 'had no duty to erect and maintain a fence on the premises in question, nor to maintain the walls of said elevation nor to maintain the premises in question.' Plaintiff's counsel in his opening and closing statements to the jury said the ordinances applied only to the Pennsylvania and that the Milwaukee had no duty to fence the right of way. A fair reading of the record convinces us that the jury could not have been prejudiced by the stress placed on the ordinances in rendering judgment against the Milwaukee."

The Milwaukee never claimed that it was prejudiced by the introduction of the fencing ordinances, and the Pennsylvania never made that claim.

It is certain that in rendering the general verdict against the Milwaukee and Pennsylvania, the jury found that the Milwaukee was negligent in the operation of its train, since this was the only charge against the Milwaukee submitted to the jury. The liability of the Pennsylvania can be predicated solely on the negligence of the Milwaukee.

The Pennsylvania had a full and fair opportunity during the trial and on appeal to defend against this claim of negligence on the part of the Milwaukee, but as the Illinois Supreme Court noted, the Pennsylvania never questioned the sufficiency of that evidence; 35 Ill.2d at 152.

CONCLUSION.

The Illinois Supreme Court, although regarding the introduction of, and references by counsel to the ordinances as erroneous, nevertheless, correctly treated any such error as harmless because there was a separate and dis-

tinct ground for recovery, i.e. the vicarious liability of the Pennsylvania for the negligent acts of the Milwaukee, which the court held was sustained by the evidence and could not have been affected by the alleged error.

The Illinois Supreme Court, in so holding, adhered to and applied a principle followed in courts of review throughout the land, that a case will not be reversed for harmless error.

The opinion of the Illinois Supreme Court therefore did not deny Petitioners any of their constitutional rights. Petitioners make no showing of any departure from the accepted and usual course of judicial proceedings that calls for an exercise of this Court's powers of supervision, such as is contemplated by U. S. Supreme Court Rule 19.

For the foregoing reasons the Petition for Certiorari should be denied.

Respectfully submitted,

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